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With Notes and Citations of Statutes

By

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CHAPTER LIX.

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In actions for damages resulting from the negligence of another the complaint should succinctly set forth the facts showing [1] a duty owing by the defendant to the plaintiff, [2] which has been neglected by the defendant, and [3] that the plaintiff has suffered injury as the proximate result of such neglect. It is not necessary [except in Iowa: Gregory v. Woodworth, 93; Iowa, 246; 61 N. W. 962] to allege the exercise of due care, or the want of contributory negligence on the part of the plaintiff, though such allegations are frequently inserted; but if the allegations of fact of the complaint conclusively show that the plaintiff was guilty of contributory negligence an allegation of due care will not avail, and the complaint will be demurrable. The statutes of the various states requiring notice of injury and filing of claim within certain periods after the accident should be carefully examined in every case. Where the liability is created by statute, as in case of highway injuries, the giving of these notices is necessary to the cause of action, and must be alleged in the complaint, but if the action arises from common law principles the giving of the notice need not be pleaded in the complaint unless the statute requires it, and the failure to give notice is a matter of defense.

1402. For personal injuries inflicted by vicious dog (Wis. Stats. 1913 sec. 1620).[1]

I. That on and prior to the.... day of....., 19.., the

[1] In Wisconsin allegation and proof of *scienter* is unnecessary as well in case of injuries to persons as in case of injuries to cattle by dogs Legault v. Malacker, 156 Wis. 507; 145 N. W. 1081; in that state also notice to the owner of the vicious character of the dog is not necessary Schaller v. Connors, 57 Wis. 321; 15 N. W. 389, unless it is desired to recover double or treble damages. Wis. Stats. 1913 sec. 1620, 1621, 1622. Nor is it necessary in the following states in case of *worrying or killing of domestic animals:* Ark. Dig. of Stats. 1904 sec. 7892-7986; Cal. C. C. 1906 sec. 3341; Colo. Code Ann. 1911 sec. 6387; Idaho Rev. Codes 1908 sec. 1220; Kans. Gen. Stats. 1909 sec. 9092, 9093; Minn. Gen. Stats. 1913 sec. 6052; Mo. R. S. 1909 sec. 855, 6458; Neb. R. S. 1913 sec. 172; N. Dak. Rev. Codes 1905 sec. 1958; S. Dak. P. C. 1908 sec. 2956; Oregon Laws 1910 sec. 5522; Utah Comp. Laws, 1907 sec. 70. In Iowa notice is unnecessary in case of injury to person or property; Iowa Supp. Ann. Code 1907 sec. 2340; the defendant in order to defeat a recovery must plead and prove that plaintiff at the time was doing an unlawful act directly contributing to the injury sustained; Beckler v. Merringer, 131 Iowa, 614; 109 N. W. 185.

defendant owned [and kept] a certain dog [named.....]* and that on said day, while the plaintiff [in the exercise of due and ordinary care] was lawfully upon the highway [*or*, within the enclosure of G.... H....] the said dog attacked and bit the plaintiff and wounded him in the leg, whereby this plaintiff became lame, and so remained for .... weeks, and was thereby occasioned great pain, and prevented from going on with his business as ..... and was obliged to and actually did expend ..... dollars in endeavoring to heal himself of said wound, all to his damage..... dollars.

[*In jurisdictions where it is necessary to allege scienter, substitute prior to the* the following;* I. That on and prior to the .... day of....., 19.., the defendant owned and kept a vicious dog well knowing him to be of ferocious and mischievous disposition and accustomed to worry domestic animals and attack and bite mankind, etc.]

WHEREFORE, etc.

1403. For worrying or killing of animals by vicious dog.[2]

[*As in last preceding form to the* and continuing*]: and that on said day, and on other days between that and the commencement of this action the said dog [wrongfully came upon the plaintiff's land, and there] hunted, chased, bit, and worried twenty sheep and ten lambs of the plaintiff; by means whereof five of the said sheep and lambs of the plaintiff, being of the value of ..... dollars, died, and became of no value to the plaintiff, and the residue of the said sheep and lambs of the said plaintiff, being also of great value, were injured, and rendered of no value to the plaintiff, all to his damage ..... dollars.

WHEREFORE, etc.

1404. The same, to recover double damages (Wis. Stats. 1913 sec. 1621).

[*As in last preceding form, adding thereto this allegation*]:

II. That prior to the inflicting of the said injuries, and on or about the .... day of....., 19.., the said dog worried, chased [and killed] certain sheep [horses *or* cattle] the prop-

[2] See preceding note.

erty of one L.... M.... and on the .... day of....., 19.., the said L.... M.... duly notified the said defendant of such last named worrying [and killing] but that the said defendant, after such notification, wholly failed and neglected to keep said dog confined as required by law, by reason of which neglect and failure the said dog inflicted the injuries upon the plaintiff's sheep first herein mentioned.

WHEREFORE, etc.

1405. To recover treble damages for injuries by vicious dog (Wis. Stats. 1913 sec. 1622).

[*As in Forms 1402 or 1403, adding thereto this allegation*]:

II. That prior to the inflicting of said injuries, and on or about the .... day of....., 19.., the said dog attacked and bit one L.... M.... and severely wounded him, and said L.... M.... on the .... day of....., 19.., duly notified the said defendant of the fact of said last named attack and wounding.

WHEREFORE, etc.

1406. For injuries from falling through open hatchway in building.

I. That the defendant, at the time hereinafter mentioned was the owner and had possession and control of a certain building and premises [*briefly designate them*] with the appurtenances thereto belonging, which building was then occupied by him as [*briefly designate the uses of the building*].

II. That said building was negilently and carelessly built, in this, that there was in the public hall or passageway in the second story of the same, at the time of its erection as well as at the time hereinafter mentioned, an unguarded hole or hatchway through the floor, opening into the first story.

III. That the defendant, well knowing the premises, did, on the ....day of....., 19.., negligently and wrongfully leave the said hatchway uncovered and unprotected, and insufficiently lighted, by means whereof the plaintiff, who was then lawfully in said building, and in the pursuit of his business [*or*, by the permission and invitation of the

defendant] then and there necessarily and carefully passing along said hall, fell through said hatchway.

IV. That by means of the premises the plaintiff was greatly hurt and injured, and became sick and lame, and so remained for a long time [*or*, so still remains] and was during the space of..... prevented from attending to his business as..... and was compelled to and did expend .....dollars in endeavoring to be healed of his said injuries [*or otherwise state injuries to plaintiff, according to the fact*] to his damage .....dollars.

[*In Wisconsin add*]; V. That afterwards, and on the .... day of....., 19.., the plaintiff caused to be served upon the defendant a notice in writing [a copy of which is attached, marked Exhibit A] signed by himself which notice stated the time and place where said damage and injuries occurred, a brief description of said injuries, the manner in which they were received, and the grounds on which the said claim is made, and that satisfaction thereof is claimed of the defendant.[3]

WHEREFORE, etc.

1407. For injuries from falling through hatchway in sidewalk, improperly covered.

I. That on the.... day of....., 19.., the defendant was [the owner and] in possession of that certain lot and store building thereon described as [*insert description*] the same being adjacent to..... street in the city of ....., and that on the day aforesaid there was a certain hole or hatchway in the sidewalk on the .... side of said street adjoining said store building, which opened into the cellar of said building and was kept and maintained by the defend-

[3] In Wisconsin in all cases of personal injuries either notice in writing must be given within two years after the accruing of the damage or the action must be commenced and the complaint served within that period. Wis. Stats. 1913 sec. 4222, subsec. 5. In all cases of injuries to property by railroad corporations either notice in writing must be given within one year after the accruing of the damage or the action must be commenced and the complaint served within the year. Sec. 1816*b*. These are statutes of limitation and not conditions precedent to the right of action, and the complaint is not subject to challenge by general demurrer if it contains no allegation on the subject. Meisenheimer v. Kellogg, 106 Wis. 30; 81 N. W. 1033; Gatzow v. Buening, 106 Wis. 1; 81 N. W. 1003.

ant for the purpose of receiving coal and other materials into said cellar.

II. That the defendant, on the day and year aforesaid, wrongfully and negligently permitted the cover of said hatchway to be and remain loose, so that when stepped upon it would tip up, and that by reason of said negligent condition of said cover the plaintiff, who was then and there passing along said public street, upon the said sidewalk, without fault on his part, fell into said hole, and thereby the left leg of the plaintiff was fractured and broken. [*State other injuries and damage.*]

III. [*Allege notice if necessary, as in last preceding form.*]

WHEREFORE, etc.

1408. For flowing water from roof on plaintiff's premises.

I. That on the .... day of ....., 19.., the plaintiff was lawfully possessed of a dwelling house and premises, situate in the county aforesaid and in which the plaintiff and his family then resided, described as follows [*describing same*].

II. That the defendant wrongfully erected a building near to the said dwelling house of the plaintiff in a careless and improper manner, to-wit, so that the eaves thereof extended over and upon the plaintiff's said premises and building, and that by reason thereof, on said day, and at other times afterwards and before this action, large quantities of rain water ran from said building upon and into the said dwelling house and premises of the plaintiff, and the walls, ceilings, papering, and other parts thereof were thereby wet and damaged, and became less fit for habitation, to the plaintiff's damage ..... dollars.

WHEREFORE, etc.

1409. For carelessly kindling a fire on defendant's land, whereby plaintiff's property was burned.

I. That on the .... day of ....., 19.., at ....., the plaintiff was and still is possessed of certain lands, described as follows [*describe same*], on which there was an orchard and fences, and also a barn containing sixty tons of hay, all which the defendant well knew.

II. That the defendant on that day intentionally kindled a fire on his land next adjoining to the plaintiff's said lands, and at the distance of ..... from the plaintiff's said land, and so negligently watched and tended the said fire that it came into the plaintiff's said land, consumed said barn and hay, of the value of ..... dollars, and also forty-five rods of post and rail fence of the value of ..... dollars, and killed forty-five fruit bearing apple trees in said orchard, and consumed and destroyed the plaintiff's grass growing on said land, to his damage ..... dollars.

WHEREFORE, etc.

1410. For undermining plaintiff's land.

I. That at the times hereinafter mentioned, the plaintiff was possessed of certain pasture land, being a part of his farm in the town of ..... described as follows [*describe same*].

II. That in the month of ....., 19.., the defendant wrongfully and negligently excavated the land adjacent to the plaintiff's said land, and took away soil therefrom, without leaving proper and sufficient support for the soil of the plaintiff's land in its natural state, whereby it sank and gave way, to the damage of the plaintiff ..... dollars.

WHEREFORE, etc.

1411. The same, another form.

I. That at the times herein mentioned plaintiff was and still is the owner of [*describe premises*].

II. That on and between the .... day of....., 19.., and the .... day of ....., 19.., the defendant excavated the land adjacent to said premises on the ..... side thereof to a depth of about ..... feet and carried away the soil therefrom, and thereby removed the support for the soil of plaintiff's said land in its natural state, whereby it sank and gave way along the entire ..... side of said lot and is still sinking and giving way, and by reason thereof has been lessened in value in the sum of ..... dollars.

WHEREFORE, etc.

1412. The same, where plaintiff has built a retaining wall.

[*Allege ownership of premises and removal of adjacent soil as in last preceding form*].

III. That in consequence of the said excavation so made by the defendant the foundation walls of the plaintiff's dwelling house [*or other building according to the fact*] were undermined and weakened and it became necessary in order to preserve the said building from falling to strengthen, to build and repair the same and to build a retaining wall along the ..... side of his said lot, and that plaintiff thereby necessarily incurred an expense of ..... dollars for labor and materials in making said repairs and constructing said retaining wall.

IV. That by reason of the premises the plaintiff has been damaged in the sum of ..... dollars.

WHEREFORE, etc.

1413. The same, where plaintiff is the reversioner.

I. That at the time hereinafter mentioned, the plaintiff was, and still is the owner of certain land [*designate it as above*] which was then in the occupation of M.... N.... as tenant thereof to the plaintiff.

II. [*As in preceding forms*].

WHEREFORE, etc.

1414. The same, where plaintiff's buildings were undermined.

I. That at the times hereinafter mentioned, plaintiff was possessed of certain land, with buildings thereon, being his house and lot in the village of ..... [*briefly describe the premises*] which were supported by the adjacent land and the soil thereof, and that the plaintiff was entitled to have them so supported.

II. That in the month of ....., 19.., the defendant wrongfully and negligently excavated the land adjacent to plaintiff's said land and buildings, and took away the soil therefrom, without leaving proper or sufficient support for the plaintiff's said land and buildings, whereby the same sank and gave way, and the house fell in and was destroyed and the goods of the plaintiff were damaged and broken

and the plaintiff incurred expense in procuring another house, and in removing and repairing his goods, and in removing the ruins of the house and rebuilding the same, to his damage ..... dollars.

WHEREFORE, etc.

1415. Against a contractor, for leaving the street in an insecure state, whereby plaintiff's horse was injured.

I. That at the time hereinafter mentioned, the defendant was engaged in laying pipes in and under the highway known as ..... street, in the city of ..... for the purpose of lighting the said highway with gas, and making the proper trenches for the purpose; and that it was defendant's duty when such pipes were laid down, to fill up properly the said trenches, and to put and leave the said highway clear and in a reasonably secure condition.

II. That the defendant and his servants, on the .... day of ....., 19.., accordingly took up part of the said highway, and made trenches and holes therein, and laid down said pipes, and displaced the earth and materials of the said highway, and so carelessly and negligently filled said trenches, and left the said highway in so dangerous and improper state, by reason of the lack of lights or barriers, that a horse of the plaintiff, of the value of ..... dollars, which he was then and there lawfully driving along the said highway, sunk and fell therein, and was wounded and lamed, and rendered of little or no value, to the palintiff's damage ..... dollars.

WHEREFORE, etc.

1416. For laying rubbish in the street, whereby plaintiff was thrown out of his carriage.

I. That the defendant, on or about the .... day of ....., 19.., wrongfully placed a large quantity of building materials and earth in the public highway [known as ..... street] in ..... and negligently left the same therein, obstructing the highway during the night-time, and without placing any light or signal there to indicate danger.

II. That in consequence of said negligence and improper conduct of the defendant, in the night-time of that day,

the carriage of the plaintiff, of the value of ..... dollars, with the plaintiff therein, then passing through said street, was accidentally driven against the said obstructions, and was thereby overturned; by means whereof the plaintiff was bruised and wounded [*allege injuries and damage as in other forms*].

III. [*In Wisconsin add allegation of notice within the year, or of timely commencement of the action as in Form 1406.*]

WHEREFORE, etc.

1417. For negligently colliding with plaintiff's carriage in the highway.

I. That on the .... day of ....., 19.., the plaintiff was riding with due care along the public highway, in the town of ....., in a chaise, drawn by a horse, both the property of the plaintiff, of the value of ..... dollars.

II. That the defendant was then the proprietor of a stage and four horses, which were then passing along said highway in the possession of defendant [*or*, of the defendant's servant] who was driving the same.

III. That defendant [*or*, that said servant] carelessly drove and managed said stage and horses at a dangerous rate of speed and without proper guidance; that by reason of his said negligence said stage struck the plaintiff's chaise, and overthrew and broke the same, and threw down the plaintiff's horse, breaking his leg, and threw the plaintiff out of his chaise upon the ground [*or otherwise describe the accident, according to the fact*], whereby the plaintiff was bruised and wounded, and was for .... days prevented from attending to his business and was put to great expense in repairing his chaise and in endeavoring to be healed of his own hurts, and he was obliged to kill his said horse in consequence of his leg being broken as aforesaid, to the damage of the plaintiff ..... dollars.

IV. [*In Wisconsin add allegation of notice or commencement of action within one year, as in Form 1406.*]

WHEREFORE, etc.

1418. The same, another form.[4]

I. [*As in last preceding form.*]

II. That the defendant was at the same time passing along said highway in a carriage drawn by two horses, which he was driving; and that the defendant then and there carelessly and negilgently drove and managed his said horses and vehicle in great speed along said highway behind the plaintiff's horse, and that by reason of said negligence, and without fault on the part of the plaintiff, said defendant's vehicle and horses struck the plaintiff's vehicle with great force, and thereby the plaintiff was thrown from his carriage to the ground with great force and violence, and his arm, shoulder and back were seriously and permanently injured, and his body otherwise bruised and injured, from which injuries he became sick, sore and disordered, and suffered great pain, and was for a long time confined to his bed and prevented from attending to his business as a farmer; that by reason of the said negligence of the defendant the plaintiff's carriage was damaged by the breaking of an axle and wheel, in consequence of the said collision, and of the further fact that the plaintiff's horse became frightened as the result of said collision and ran away, that the plaintiff was put to expense for repairing his said carriage, amounting to the sum of .....dollars; and that by reason of the facts and circumstances above named the plaintiff has suffered damage in the amount of ..... dollars.

III. [*If notice of the injury is required to be served by the statute, allege the same as in Form 1406.*]

WHEREFORE, etc.

[4] This complaint is in substance the complaint in the case of Hanson v. Anderson, 90 Wis. 195; 62 N. W. 1055, which was held to be sufficiently definite and certain as to the grounds of negligence claimed, and the particular injuries received, so that a motion to make the same more definite and certain in these particulars was denied. It was said, however, that the defendant, if he desired an itemized statement of the damages, could have demanded a bill of particulars.

1419. Against owner and contractor for injuries suffered by fall of building materials in the street during the erection of a building (adapted from Smith v. Milwaukee B. & T. Exch., 91 Wis. 360; 64 N. W. 1041).[5]

I. That the defendant C.... D.... is the owner of that certain parcel of real estate located upon the S. E. corner of ..... street and ..... street, in the city of ....., and was at the time hereinafter mentioned erecting and constructing upon the said lot a six story building, and that the defendant E.... F...., by virtue of a contract previously made with the said defendant C.... D... was doing the mason work on said building for the said C.... D.....

II. That by the terms of an ordinance duly passed by the common council of the city of ..... on the .... day of ....., 19.., which said ordinance was in effect and unrepealed at the date hereinafter mentioned, any owner or contractor who shall build or cause to be built within the said city of ..... any building adjacent to any public sidewalk is required after the completion of the first story of said building to cause a passage way to be laid on front of said building upon the sidewa k for the convenience of foot passengers and to cause said passage way to be roofed over at a height of not less than ten feet [*or set forth the ordinance in haec verba*].

III. That said building, so in process of erection, was at the date hereinafter mentioned within the limits of the said city of ....., and was and is adjacent to the public sidewalk upon the ..... side of said ..... street, and that the first story thereof had been completed, and that the defendants were then at work upon the third or fourth story of said building.

IV. That on the .... day of ....., 19.., at about the hour of .... o'clock a. m. of that day, the plaintiff was walking north upon the ..... side of said ..... street

[5] In the case from which this form is adapted it was held that such an ordinance was reasonable, and that when a passer-by was injured by reason of the failure to comply with the provisions of the ordinance he could base a claim of negligence on account of the failure of the owner and contractor to comply with the ordinance, because the ordinance was framed to protect such passer-by from injury.

adjacent to said building, as she had a lawful right to do, and in the exercise of dure care, and when she was passing in front of the said building she was struck upon the head by a brick which fell from said building a distance, as she is informed and believes, of about forty feet.

V. That the said defendants, negligently and carelessly performed work in and about the erection and costruction of said building, and negligently permitted the said brick to fall which struck the plaintiff upon the head as aforesaid, and negligently failed to erect any barriers or guards over or upon said sidewalk, and wholly failed to comply with the requirements of the ordinance aforesaid, and failed to give any notice or warning to persons using said sidewalk that there was danger in walking thereon from the falling of building materials; and that by reason of such negligence and carelessness on the part of said defendants the plaintiff was injured as aforesaid, and not otherwise.

VI. That the said brick which struck the plaintiff on the head as aforesaid crushed in the skull so that pieces of the broken bones of the skull had to be extracted together with a portion of the brain, and that the plaintiff will always have a hole in the skull where said bone was so crushed, and that by reason of such accident she has suffered great pain and mental distress, and was for a long time confined to her bed; and that, as she is informed and believes, the injury to her head and brain will be permanent, and that by reason thereof the plaintiff will continue to suffer physical and mental distress for the rest of her life; all to her damage in the sum of ..... dollars.

VII. [*Allege notice of injury, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1420. For injuries from the kick of a horse allowed to run at large, contrary to the terms of a city ordinance (adapted from Decker v. McSorley, 111 Wis. 91; 86 N. W. 554).

I. That the defendant C.... D.... on the .... day of ....., 19.., was, and for several years prior thereto had been, a resident of the city of ....., a municipal corpora-

tion organized and existing under the laws of the state of ....., and that upon the date aforesaid, and for several years prior thereto, one of the ordinances of the said city of....., duly enacted under and pursuant to the provisions of the charter of said city and the laws of said state, prohibited the running at large of horses within the limits of said city, and provided among other things that the owner or any person in whose charge such animal might be, and who should permit the same to run at large within the limits of said city, should be liable to punishment by fine for the violation of such ordinance.

II. That on and prior to the .... day of ....., 19.., aforesaid, the defendant owned and had charge of a horse, which said horse was of a vicious disposition and in the habit of kicking and biting people, of which disposition and habit the defendant had actual notice and knowledge for a long time prior to said date; but that notwithstanding such vicious disposition of said horse and the existence of said ordinance, the defendant had been in the habit of permitting said horse to run at large within the limits of said city, and that on the said .... day of ....., 19.., said defendant, in violation of said ordinance did wrongfully and negligently permit said horse to run at large upon the streets of said city, and while the said horse was so running at large upon ..... street, one of the principally traveled streets of said city, and the plaintiff was lawfully and with due care passing along said ..... street without knowledge of the vicious disposition of said horse, the said horse violently kicked the said plaintiff upon the head, fracturing his skull, etc. [*allege injuries according to the fact*]: all to his damage in the sum of ..... dollars.

III. [*Allege notice of injury, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1421. Complaint for injuries suffered from defective highway.

I. That at the times hereinafter mentioned the defendant was and still is an organized town [*or, in case of a city:* a municipal corporation] in the county of ..... in this state, and that at said times there existed a public highway

[*or* street] in said town [*or* city] much traveled by the public, known as [*give name if it had one*] extending from [*give limits or so describe it as to identify with certainty*].

II. That on and prior to the .... day of ....., 19.., the said highway was insufficient and in want of repair, in this, that a hole about two feet in depth and four feet in length [*or otherwise describe the defect according to the fact*] existed in the travled track of the same at a point in said road [*describe place with reasonable certainty by giving distance from known points or landmarks*].

III. That said hole in said highway had existed previous to said date for at least three weeks, and was during all of that time well known to said town [*or* city] and its officers charged with the duty of inspecting and repairing highways, but that the said officers wholly failed and neglected to repair the same.

IV. That on the said .... day of ....., 19.., the plaintiff was with due care traveling in said highway in a two-horse wagon, drawn by two horses, all the property of the plaintiff, in the night-time, and by reason of the insufficiency and want of repair of said highway at the place aforesaid the forewheel of said wagon ran into said hole, and the plaintiff was thrown out of his said wagon to the ground, breaking his leg and bruising and injuring his head and body, by which injuries he became sick, sore and bruised, and suffered great pain and distress, and was for a long time confined to his bed; and that in consequence of such injuries he was compelled to employ physicians, medicines and nurses, at an expense of ..... dollars.

V. That by reason of said fracture of his leg the same is permanently lamed, and the plaintiff made a cripple for life [*or otherwise state permanent injuries received*]; and that by reason of said injuries he was prevented from attending to his business as a ..... for the space of .... weeks, and was put to great expense and loss; in all, for such injuries, expenses, and losses, to his damage ..... dollars.

VI. [*In Wisconsin add*]: That on the .... day of ....., 19.., and within thirty days [*in case of a city or village the notice must be served within fifteen days*] after the happening of said injury above alleged, the plaintiff caused to be served on L.... M.... one of the supervisors of said town [*or*, mayor of said city, *or*, one of the trustees of said village,

according to the fact] a notice in writing, stating therein the place where such damage occurred, substantially as above alleged, and describing generally the insufficiencyiy and want of repair which occasioned the injuries above alleged, the injuries received by the plaintiff and that satisfaction therefore is claimed by him of said town [of which said notice a copy is hereto annexed, marked "Exhibit A" and made a part of this complaint]. [*See Wis. Stats. 1913 sec. 1339.*]

VII. [*If an action be against a town:*] That on the .... day of ....., 19.., the plaintiff filed with the town clerk of said defendant town a written statement of his claim, to be laid before the town board of audit [of which written statement a copy is hereto annexed, marked Exhibit B, and made part of this complaint]; and that on the .... day of ....., 19.., the town board of audit disallowed said claim wholly; and on the first Tuesday of April, 19.., and more than ten days before the commencement of this action, the next annual town meeting of said town was held, and no action taken for the allowance of said claim. [*See Wis. Stats. 1913 sec. 824.*]

[*In case the action be against a city under special charter requiring the filing and disallowance of a claim before suit, the allegations should conform to the charter requirements.*]

[*In Minnesota insert the following allegation:*] That on the .... day of ....., 19.., and within thirty days after receiving the injury herein alleged the plaintiff gave and presented to the council of the said defendant [*or other governing body, naming it*] a written notice of said injury and claim for compensation therefor, stating the time when, the place where, and the circumstances under which such injury and loss occurred, and the amount of compensation demanded by plaintiff from defendant for such injury and loss; and that, although more than ten days have elapsed since the presentation of such notice and claim, defendant has not satisfied said claim. [*See Minn. Gen. Stats. 1913 sec. 1786–1788.*]

[*In Iowa the action must be brought within three months unless notice of the time, place and circumstances of the injury be served on the municipal corporation within sixty days* [*Iowa Ann. Code 1897 sec. 3447 subd. 1*], *in which case it may be brought within two years, and the giving of the notice should be alleged. Robinson v. Cedar Rapids, 100 Iowa,*

662; 69 N. W. 1064; Pardey v. Mechanicsville, 101 Iowa, 266; 70 N. W. 189.]

[*The general statutes of the particular state, and the charter of the defendant city, if it be specially chartered, should be carefully examined, and the allegation of presentment of notice or claim should be made to conform thereto.*]

WHEREFORE, etc.

1422. Complaint against city for sidewalk injury.

I. [*As in last preceding form.*]

II. That there was at the times hereinafter mentioned a sidewalk maintained by said city and greatly used by pedestrians, upon the ..... side of said street and constituting a part thereof, and that on the .... day of ....., 19.., and for more than three months prior thereto said sidewalk was insufficient and in want of repair in this, that at a point about 100 feet east from the corner of ..... street [*or otherwise designate spot with particularity, and as designated in the notice*] there was a hole in said sidewalk [*describing its size and depth*].

III. That said defendant and its officers and agents charged with the construction and maintenance of said walk had actual knowledge of the existence of said hole at the time of and long prior to the happening of the injury herein complained of, and for such a length of time prior to said accident as that in the exercise of reasonable diligence they should have repaired the same.

IV. That plaintiff on the .... day of ....., 19.., while passing over said walk with due care, stepped in said hole and fell, severely spraining her ankle and knee, and painfully bruising and injuring her about the body and limbs, and especially her back and spine. That said injury is permanent in character. That as a result thereof plaintiff was confined to her bed for .... weeks and was compelled to employ nurses at an expense of ..... dollars, and that she has paid out for necessary medical attendance the sum of ..... dollars, and that by reason of said injury she has sustained damages in the sum of ..... dollars, no part of which has been paid.

V. [*Allege notice and demand, as in last preceding form.*]

WHEREFORE, etc.

1423. The same, another form.

I. [*As in Form 1421.*]

II. That on the .... day of ....., 19.., the plaintiff was, in the exercise of due care, passing along said street on the sidewalk on the ..... side thereof, and when at a point [*describe the point with certainty, as for instance:* immediately in front of the house of one L.... M...., numbered .... on said street, and .... feet east of the west line of the premises of said L.... M....] he fell and was greatly injured by reason of the insufficiency and want of repair of said sidewalk.

III. That said sidewalk was then and there insufficient in this, that a board therein had become decayed and rotten, and was then and there unsafe and dangerous, and as the plaintiff, in the exercise of due care, was walking thereon he stepped upon said board, not knowing its condition, and by reason of its decayed condition it broke through and caused him to fall with great force, breaking his ankle, spraining his knee, and dislocating his elbow and otherwise bruising and injuring him [*or otherwise state injuries received*].

IV. That by reason of said fall the plaintiff suffered great and permanent injuries, was confined for a long time to his bed, was rendered sick, sore, lame and helpless, suffered great pain, was put to expense for medical treatment and attendance, medicine and nursing, kept from his business, and otherwise greatly injured, to his damage ..... dollars.

V. That, as the plaintiff is informed and believes, the said city, its officers and superintendent of streets, at the time of said injury and for a long time theretofore well knew of the insufficiency and want of repair of said sidewalk at the point where said injury occurred, and negligently omitted to repair the same.

VI. [*Allege notice and claim as in Form 1421.*]

WHEREFORE, etc.

1424. For injuries resulting from lack of guard or railing on culvert.

I. [*As in Form 1421.*]

II. That on and prior to the .... day of ....., 19.., the said highway was insufficient and in want of repair in

this, that at a point [*designate point with certainty*] there was a wooden culvert or bridge in said highway .... feet in width from east to west, and .... feet in length from north to south, and that at the south end of said culvert or bridge there was an abrupt descent to the ditch below of .... feet with no guard or railing of any kind to prevent teams or wagons from running off from the said culvert into the said ditch.

III. [*Allege knowledge on the part of town officers, and the happening of the accident, etc., substantially as in allegations III and IV of Form 1421, varying same according to the facts, and conclude with proper allegations of notice and claim.*]

WHEREFORE, etc.

1425. For sidewalk injury, from lack of guard or railing.

I. [*As in Form 1421.*]

II. That said highway was a much traveled thoroughfare, and that the sidewalk on the .... side thereof was in constant use by pedestrians.

III. That on the .... day of ....., 19.., and for a long long time prior thereto said sidewalk at a point [*designate point with certainty*] was insufficient and in want of repair in this, that at the outer edge thereof there existed an abrupt descent of .... feet without guard or rail of any kind to prevent persons using the same from inadvertently stepping off said walk, and that the defendant and its officers had knowledge of the said insufficient and unsafe condition of said sidewalk for a long time, to-wit, for the space of .... weeks prior to the happening of the injury hereinafter mentioned.

IV. That on the said .... day of ....., 19.., while the plaintiff was with due care passing along said sidewalk at the place above-named he was precipitated from said sidewalk, solely by reason of the insufficiency and lack of a guard-rail aforesaid, and fell with great force [*allege injuries and damages as in previous forms, and add allegation of notice and claim as may be necessary by the statute or charter*].

WHEREFORE, etc.

1426. Complaint for sidewalk injury caused by loose boards (sustained in Barney v. Hartford, 73 Wis. 95; 40 N. W. 581).

I. [*Allege incorporation of city and existence of street as in Form 1421.*]

II. That at the times hereinafter mentioned, and for .... months prior thereto, there was upon the south side of said street and constituting a part thereof a certain sidewalk much traveled by pedestrians, consisting of wooden planks resting on wooden stringers, and that on the .... day of ....., 19.., the said sidewalk in front of the premises owned and occupied by one H.... W.... on said street between ..... street and ..... street, at a place about two rods west of the small gate in front of the house of said H.... W.... [where the boards of said sidewalk are laid lengthwise east and west at right angles to the adjoining boards laid north and south] was not in good nor safe repair, but was insufficient and in want of repairs in this, that said sidewalk at and about the place mentioned consisted of several wooden planks or boards laid lengthwise from east to west and adjoining planks or boards laid north and south; that said boards or planks running east and west were laid upon wooden sleepers or stringers, one at each end thereof, and one near the middle thereof; that the inside board or plank, the board there nearest the fence along said walk on the south side thereof was not nailed or fastened to any of said stringers, except insecurely at the middle of said board, but was loose at the ends; that said board or plank was so short that it did not rest, as to its ends, upon the stringers or sleepers, and was in nowise fastened at the ends, and that said board was several inches from the ground; that when one of the ends of said board was stepped upon the other end was lifted up several inches from the adjoining boards and from those running at right angles thereto on the east end thereof, leaving a dangerous space and trap in said walk; that said board was also warped, and said ends thereof were somewhat above the level of the adjoining boards; that said board was easily displaced; that the said stringers or sleepers laid to support said board were old, rotten, unsubstantial, and insufficient, and would not hold nails or spikes, and that said board was decayed at its ends,—which

defects and insufficiencies were of such a degree that said sidewalk at said place was unfit, unsafe and dangerous to travel and step upon by persons using due care.

III. That the defendant had knowingly and negligently permitted and allowed said sidewalk at said place to be and remain in the condition above set forth for several months immediately prior to and including the said .... day of ....., 19.., an unreasonable length of time, notwithstanding the said defendant had during all of said time complete and full knowledge and notice of said insufficiency and want of repair of said walk at said place.

IV. That on the evening of said .... day of ....., 19.., the plaintiff was necessarily and carefully traveling on foot over said sidewalk, and unaware of said defective and dangerous condition, and while so traveling and entirely by reason of the defects aforesaid was caught by his right foot and ankle, and was tripped by said board at said defective part of said walk, to-wit, the east end of said particular plank or board, while said board and portion of said walk were in such condition, and while the end of said board was raised and sprung from the adjoining boards unbeknown to the plaintiff, and was thereby thrown and his said foot and ankle and leg were severely wrenched and bruised, and his said ankle severely sprained.

V. That by reason of said fall and injuries the plaintiff was made dangerously sick, sore, lamed and crippled, and was confined to his bed for several months, being deprived entirely of the use of his right leg, and suffering great pain, and that he is still unable to walk except with the aid of crutches, and will for a long time be so unable; that he was compelled to and did incur a large expense in attempting to be cured of said injuries and still will be subjected to expense in properly treating the same; that at the time of the accident he was enjoying a large, lucrative, and profitable business as a dentist; that by reason of said fall and injuries he was for more than three months entirely unable to be at his place of business or give it any attention whatever and he is now, and will be for a long time, unable to attend properly to his usual and necessary business, and that he has sustained and will continue to sustain, great pecuniary loss thereby; that he has been obliged at great expense to hire help to aid him in his business, so that the same would not be totally destroyed,

and that he will still be obliged to hire such help for a long time to come; and that plaintiff's ankle joint has been permanently injured all to his damage ..... dollars.

I. [*Allege giving of notice and claim, as in Form 1421.*]

WHEREFORE, etc.

1427. Allegation of rotten planks and hole in sidewalk (held sufficient in Amos v. Fond du Lac, 46 Wis. 695; 1 N. W. 346).

That a certain portion of said sidewalk in front of No. ..... Block No. .... was defective, insufficient and in want of repair in this, to-wit, that the planks forming and making the said portion of said sidewalk adjoining said lot were old, decayed and rotten with holes and openings down and through the same, and that there was a dangerous hole downward through said planks which hole was oblong in shape and about fourteen inches long and four inches wide, and of lessened width toward each end thereof, and it was about ten inches from the top of said plank down through said hole to the ground below, and said defendant had negligently provided no guards, barriers, or protection to warn persons passing over said sidewalk of its defective and dangerous condition, and that by reason of the premises said walk was in an unsafe and insufficient condition for travel thereon at the time hereinafter stated, and for a long time theretofore, to-wit, for the space of three months, had been by said defendant knowingly, carelessly and negligently permitted and suffered to be and remain in such condition.

1428. For injury on a sidewalk resulting from accumulation of snow and ice (adapted from Paulson v. Pelican, 79 Wis. 445; 48 N. W. 715; Wis. Stats. 1913, sec. 1339).[6]

I. That at the times hereinafter mentioned the defendant was, and still is, a duly organized town in the county of

[6] There is no liability ordinarily for an accident caused by the mere slippery condition of the sidewalk resulting from the action of the elements; but if snow and ice be allowed to accumulate in such an uneven and rounded form that it is dangerous for a traveler with due care to walk thereon there may be liability. Paulson v. Town of

..... state of ..... containing within its limits an unincorporated village of more than 1000 people, known as the village of .....

II. That at the time of the injury hereinafter set forth, and for a long time prior thereto, there was in the said village of ..... a street known as ..... street, which was one of the public highways of the defendant town, and was largely used by the public generally for travel, by teams and on foot, the center thereof being used for travel by teams and a portion on the south side thereof being so used by foot travelers.

III. That on the .... day of ....., 19.., that portion of said ..... street over which foot travelers usually and commonly pass as aforesaid was in a dangerous and unsafe condition for foot travel, by reason of snow and ice having been negligently left for a long period to-wit, for more than three weeks to accumulate along the said southerly side of said street, and especially at a point [*name the point of the accident*], which said accumulation of snow and ice became so uneven and rounded in form as to make travel along and over the said highway unsafe and dangerous; and that said accumulation existed in said unsafe and dangerous condition continuously for more than three weeks prior to the happening of the accident hereinafter described.

IV. That notwithstanding it was the duty of the defendant town to keep said street at said point in a reasonably safe condition for travel by the public, and notwithstanding said town and its officers had notice of the said defective and unsafe condition of said street at the point aforesaid for a long time prior to the said .... day of ....., 19.., the said defendant and its officers neglected and failed to put said street in a safe condition for public travel.

V. That on the .... day of ....., 19.., at the hour of .... o'clock in the evening of said day, the plaintiff was lawfully traveling along the said south side of said ..... street on foot, in a careful manner, when at a point [*describe the point with certainty*] owing to the aforesaid slippery and uneven condition of said street at that point, this plaintiff

Pelican, 79 Wis. 445; 48 N. W. 715. In Wisconsin the accumulation of snow or ice upon any bridge or highway must have existed for more than three weeks before there can be any liability. Wis. Stats. 1913 sec. 1339.

slipped and fell in such manner that one of his legs was broken [*state other injuries received, and the damage resulting*].

VI. [*Allege the giving of notices required by the statutes of the particular state, as in Form 1421.*]

WHEREFORE, etc.

1429. **By administratrix for death of her husband, resulting from negligent construction of a cistern by the municipality (adapted from Mulcairn v. Janesville, 41 Wis. 144).**[7]

I. [*Allege incorporation and existence of the defendant city, as in Form 1421.*]

II. That on or about the .... day of ....., 19.., the said defendant city, acting by its common council, resolved and determined to construct a certain fire cistern, at the corner of ..... street and ..... street, in said city, and that thereafter the said city entered upon the construction of said cistern and employed men and servants, and purchased the necessary materials for the construction thereof.

III. That on or about the .... day of ....., 19.., the said city had made an excavation at the place above mentioned for the said cistern, and had erected within said excavation a wall along both sides of said excavation, and along the west end thereof, and that on the said date no wall had been erected at the east end thereof; and that the said walls so erected were intended to compose the sides of said cistern. That on the said .... day of ....., 19.., the said walls upon the sides of said excavation were about forty feet in length, about ten feet in height, and twenty inches in thickness, and the wall upon the west end of said excavation was about twelve feet in length, and of the same height and thickness as the other walls; that said walls were carelessly and negligently constructed by said city, in this, to-wit, that the same were composed of improper material and built

[7] As this action is based on the common-law liability of the city for a negligent act committed by its officers within the general scope of their powers while acting for the municipality and not as governmental officers, and is not based upon the statutory liability for a defective street, no notice of injury, under Wis. Stats. 1913 sec. 1339 is necessary. If, however, the particular city charter or statute requires a filing and disallowance of claim before action, this should be alleged. Ziegler v. West Bend, 102 Wis. 17; 78 N. W. 164.

in a careless and negligent manner without proper foundation or footing, resting upon the sand and gravel upon the bottom of said excavation, and further that there was a space between the outer sides of said walls and the sides of said excavation, which had been filled with loose sand and gravel and dirt, the weight of which rested against said walls, and that said walls had no props or braces to prevent them from falling inwards; all of which facts were well known to the said city and its officers upon the said ..... day of ....., 19.., notwithstanding which knowledge, neither the said city nor its officers took any means to prevent the said walls from falling.

IV. That on the said .... day of ....., 19.., one L.... M.... was employed by the said defendant city as a servant to do certain work in and about said excavation, and about said walls, and that the said L.... M.... was at that time ignorant of the defective and negligent construction of said walls as aforesaid, and while the said L.... M.... was so employed and engaged in said excavation, under the direction of the defendant and in the exercise of due care, that portion of the north wall of said cistern, by reason of the negligent construction thereof and the failure to provide braces or props for the same, and by reason of the weight and pressure of the loose sand and gravel on the outside of said wall as aforesaid, fell inwards into the said excavation and upon the said L.... M...., fatally injuring him so that he died as the result of said injuries on the .... day of ....., 19..

V. That at the time of the death of the said L.... M.... as above set forth, he was, and for a long time had been a married man, and left surviving him this plaintiff, his widow, and the following named children [*name children and give their ages*], all of whom were dependent upon the said L.... M.... for support.

VI. That on the .... day of ....., 19.., upon petition duly made to the ..... court of ..... county, this plaintiff was duly appointed administratrix of the estate of said L.... M...., and that thereafter and before the commencement of this action, she duly qualified and is now acting as such administratrix.

VII. [*Allege notice, if any is required, as in Form 1406.*]

WHEREFORE, etc.

1430. Complaint for trespass by city officers while abating an alleged public nuisance (adapted from Hamilton v. Fond du Lac, 40 Wis. 47).[8]

I. [*Allege incorporation and existence of the defendant city, as in Form 1421.*]

II. That on the .... day of ....., 19.., and upon sundry other days and times of day, and before the commencement of this action, the defendant unlawfully entered upon the lands and premises of the plaintiff, lying and being in the said city of ..... described as follows [*give description*] and dug up and carried away .... thousand cubic feet of earth, and thereby destroyed about .... surface square feet of said lot, to the damage of the plaintiff ..... dollars.

WHEREFORE, etc.

1431. For negligently leaving a dangerous structure in the street (adapted from Hughes v. Fond du Lac, 73 Wis. 380; 41 N. W. 407).[9]

I. [*Allege incorporation of the defendant city and the existence of the street in question, as in Form 1421.*]

II. That the said street was at the times hereinafter mentioned, and still is, largely used by the citizens of the said city for public travel.

III. That on the .... day of ....., 19.., and for some years prior thereto, the defendant city owned, used and controlled a large iron and wooden roller weighing several tons, and about 6 feet high and 10 feet wide, used by the said defendant for the purpose of pressing and making more compact the various streets of said city, which said roller was and is an ungainly and unsightly object, and naturally calculated to frighten horses.

IV. That on the .... day of ....., 19.., and for some weeks prior thereto, the said roller was left by the said city and its officers at a point on the .... side of said .....

[8] See note to Form 1429. The case from which this form was taken was a case where the city, acting under its charter powers to abate nuisances, passed an ordinance declaring a portion of a small river within the city limits to be a public nuisance, and providing for the abatement thereof, and excavating a new channel across the plaintiff's premises.

[9] This action is also based upon the common law liability. See notes to Forms 1429 and 1430.

street in said city, about ..... feet west from the intersection of said street with Main street, and about .... feet from the north side of the sidewalk on the south side of said ..... street, one wheel of said roller being within the south road track of said street; and the said roller thus unlawfully occupied and obstructed about one-third of said street, making the same dangerous and unsafe for travel; and that the defendant had knowledge of the situation of said roller for several weeks prior to the accident hereinafter mentioned.

V. That on the .... day of ....., 19.., at about .... o'clock in the evening of said day, the plaintiff was driving a single horse and carriage west upon said ..... street, with due care, and when he came to the point where said roller was situated as aforesaid, his horse became frightened and unmanageable at said roller, and escaped from the plaintiff's control, and ran away, partially overturning the carriage and throwing the plaintiff upon the ground with great violence, thereby seriously injuring him [*state injuries*], to the damage of the plaintiff ..... dollars.

WHEREFORE, etc.

1432. Against municipality for building a street so as to dam up a river and flow the plaintiff's premises (adapted from Spellman v. Portage, 41 Wis. 144).

I. [*Allege incorporation and existence of defendant city, as in Form 1421.*]

II. That the said city has, by virtue of its charter, the care and control of all its streets within the corporate limits of said city and the right and duty to build and grade the same, and that the defendant, by its agents and servants, in the year 19.., graded and built a raised highway in said city and still maintains the same, leading from the bridge across the ..... river, southwesterly to the limits of said city, a distance of about one mile.

III. That in building and making said highway the said city raised the grade thereof above the level of the surface of the surrounding ground about 4 feet, and that the said street is built upon and across a large flat tract of marsh land dividing the Wisconsin and Baraboo rivers, over a large

part of which tract of land water runs from the Wisconsin to the Baraboo River at every stage of high water, which is very frequent; that in constructing the said road, the same ought to have been so constructed that the water could pass through said road without obstruction, and for that purpose said road should have been supplied with sufficient sluices and culverts at short intervals for the passage of said water over said flat tract of land from the Wisconsin River to the Baraboo River, as has been the usual and accustomed course of said water from time immemorial; but that the said defendant, disregarding its said duty, by its agents and servants, negligently built and constructed the said graded road without providing the same with culverts, bridges and sewers so as to enable the waters of said Wisconsin River to pass through and flow in the natural and accustomed course into the Baraboo River, and that on account of the said negligent and unskillful construction of the said road said waters of the Wisconsin River, at high water, during the month of ....., 19.., were obstructed by the said road and grade, and were caused to flow back upon and submerge lots [*describe property*], which lots were then owned and occupied by the plaintiff, and to submerge, drown, injure and destroy the crops thereon, the property of the plaintiff; all to his damage in the sum of ..... dollars.

WHEREFORE, etc.

1433. By passenger against railway company, for injuries resulting from negligent collision of trains.

I. That the defendant is and was at the times hereinafter named a railroad corporation duly organized under the laws of the state of ..... and operating a commercial railroad between the city of ..... and the city of ..... in said state, carrying passengers and freight thereon for hire.

II. That on the ... day of ....., 19.., the plaintiff purchased from the defendant a ticket entitling him to safe transportation on defendant's said railroad from ..... to ..... and thereupon boarded one of defendant's trains, and was received as a passenger thereon.

III. That while the plaintiff was upon said train on said .... day of....., 19.., and was being transported as a pas-

senger thereon, said train was so negligently and carelessly operated and managed by the defendant and its servants in control thereof* that the same violently collided with another train of the defendant at ..... whereby the car in which the plaintiff was riding was thrown from the track and upset, and the plaintiff was violently thrown from his seat, and his right leg fractured and his head and chest bruised, by reason of which injuries he was for a long time sick and confined to his bed and rendered permanently lame in said leg, and was also prevented from attending to his business as a ..... for the space of .... weeks, and compelled to expend for medical services and nursing the sum of ..... dollars, all to his damage in the sum of ..... dollars.

IV. [*If by local statute notice or filing of claim is necessary before action allege the giving of same. See Form 1406 and note.*]

WHEREFORE, etc.

1434. The same, where passenger jumped from train to avoid injury from collision.

[*As in last preceding form to the * and continuing*]: that a violent collision was imminent, and did in fact actually occur, with another train of the defendant upon its said track at ..... and that by reason of the imminence of such collision there was great danger that the plaintiff would be severely injured or killed if he remained upon the said train; and that in order to escape such danger and save his life this plaintiff, just prior to the moment of such collision was compelled to and did jump from his said train to the ground, and in so doing broke his leg and [*state other injuries received, and damage, according to the fact*].

IV. [*Allege notice, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1435. By passenger for injuries sustained by defects in station platform.

I and II. [*As in Form 1433.*]

III. That at the station of said defendant, at said city of ..... there was maintained by said company a wooden platform adjacent to the railroad of said defendant, for the accommodation of its passengers, and at which the trains of

said company stopped for the purpose of receiving and discharging passengers, which said platform was insufficient and dangerous in this [*state defect particularly, as:* that there was a deep hole therein, *stating size and location*]; and that the plaintiff, while alighting from said train on said platform in the night-time, without fault on his part, inadvertently stepped into said hole, throwing him to the ground and breaking his leg [*or otherwise state the injuries received and the damages.*]

IV. [*Add allegation of giving notice, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1436. By passenger, for injuries from derailing of train by collision with cattle straying on track through defective fence.

I and II. [*As in Form 1433.*]

III. That said defendant was required by law at that time, to erect and maintain, on both sides of its track, good and sufficient fences of the height of four and a half feet along its said road [*or describe the fence prescribed by the particular statute*], but that said defendant failed and neglected to keep up and maintain said fences, and negligently and knowingly allowed and suffered the same to be insufficient and out of repair.

IV. That by reason of such insufficiency and want of repair a number of cattle depasturing on the lands of one A.... B...., adjoining said track, in the town of ....., county of ..... escaped through said defective fence upon said track, and that the defendant so negligently and unskillfully ran and operated said train by its agents, conductor and engineer in charge of the same, that the said train on the day aforesaid ran into and against said cattle, and thereby the car in which plaintiff was riding was derailed and upset, and thereby the said plaintiff received severe injuries, his shoulder was broken, his spine injured, his skull fractured, and other bruises and injuries sustained, whereby he was made sick, sore, lame and disabled, and for a long time confined to his bed and helpless, and rendered permanently a cripple [*or otherwise describe injuries according to the fact.*]

V. [*Allege notice, if required, as in Form 1406.*]

WHEREFORE, etc.

1437. By passenger for forcible ejection from train.

I and II. [*As in Form 1433.*]

III. That the defendant, by its officers and servants in charge of said train, at a point on the line of its said railroad, about .... miles east from the station of ..... [the same not being a usual stopping place nor near any dwelling house][10] unlawfully and with force and violence ejected the plaintiff from said train and refused to permit him to ride further thereon.

IV. That by reason of said ejection, and the violence so used by defendant's servants, the plaintiff was severely bruised about the face and body and suffered great pain of body and humiliation, and was delayed in his business; all to his damage in the sum of ..... dollars.

V. [*Allege notice, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1438. By husband for injuries to wife while a passenger.

[*After alleging that plaintiff is the husband of the injured person, follow preceding forms in statement of the incorporation of the defendant, its business as a carrier, the purchase of a ticket, the transportation of the injured person, the negligence of the company, and the resulting injuries, with necessary changes of verbiage to show that the plaintiff's wife was the injured person, and continue*]:

V. That by reason of the premises the plaintiff has been put to great expense, and will continue to be subjected to great expense in procuring necessary medical and surgical attendance, care and suitable nursing for his said wife, and has been and will be hereafter put to great loss and expense in money by the loss of her services, by reason of her permanent injuries and physical disabilities caused by such injuries, and has lost the comfort of the society and health of his said wife, in all to his damage ..... dollars.

[10] This clause is not essential where the passenger has a ticket, or has paid his fare or offers to pay it. The statute of Wisconsin prohibits the ejection of a passenger at any place except a usual stopping place, or near a dwelling house. Wis. Stats. 1913 sec. 1818; Phettiplace v. N. P. R. R., 84 Wis. 412; 54 N. W. 1092. Hence, if the ejection was not at one of the named places, it is well in Wisconsin to allege the fact, so that even if defendant should prove that the plaintiff refused to pay his fare, there might still be a recovery on account of the ejection at a place unauthorized by law.

VI. [*Allege notice, if necessary, as in Form 1406.*]
WHEREFORE, etc.

1439. By employee against railroad company for injuries resulting from negligent construction and inspection of track (adapted from Crouse v. R. R. Co., 102 Wis. 196; 78 N. W. 446, 778).

I. [*As in Form 1433.*]

II. That the plaintiff, on and prior to the .... day of ....., 19.., was an employee of said defendant as an enginer, running a freight train from the city of ..... to the city of ..... and on said last named day was operating a locomotive engine for defendant in hauling a train from ..... to .....

III. That while so operating said engine and train, with due care, and at about the hour of 11:30 o'clock in the evening of said day, the plaintiff with his said train arrived at a point about one and one-half miles north of the city of ..... and ran into a washout or hole in the defendant's said track, derailing said train and greatly injuring the plaintiff as hereinafter set forth.

IV. That at the place where said washout occurred the defendant had prior to said .... day of ....., 19.., constructed under its said track a small wooden culvert for the passage of water under its track, and that said culvert was too small for the purpose for which it was intended, was improperly located, and that defendant had prior to said date carelessly and negligently excavated and removed large quantities of gravel from the immediate vicinity of said culvert, thereby greatly weakening the same and the track of the defendant at that point, and leaving the said culvert and roadbed insufficient and defective, and liable to be washed out, all of which defects and insufficiencies were known to the defendant and its servants in charge of said roadbed, but unknown to the plaintiff.

V. That on the evening aforesaid a heavy rain commenced to fall at the point of said washout and in the surrounding country, and continued for a number of hours prior to the time when plaintiff's said train arrived at said point, and that both defendant's section foreman, whose duty it was to inspect the defendant's track at that point, and defend-

ant's roadmaster, whose duty it was to inspect said track and the culverts therein and their supports, and repair the same, negligently failed and neglected to inspect said track and culvert on said night, and failed to warn the plaintiff and the trainmen upon said train of said washout, and said roadmaster prior to the evening aforesaid negligently allowed and directed the servants of said company to excavate the earth and gravel near said culvert and track, thereby greatly weakening the same, and making the same unsafe and dangerous for the passage of trains, all of which facts were unknown to the plaintiff.

VI. That by reason of the said defective, improper and inadequate construction of said culvert and track, and the negligent excavation of gravel about the same the said culvert and track were washed out for a considerable distance on the evening aforesaid, by the water accumulating from said rain, which fact was unknown to the plaintiff and could not have been ascertained by the plaintiff in the exercise of reasonable care, and solely by reason of the said washout so negligently caused, and the failure of defendant servant in charge of said track and culvert to inspect the same and warn the plaintiff of said washout, the said train was precipitated into said hole or washout, and the plaintiff was thrown from his engine and suffered great bodily injuries [*state injuries particularly*].

VII. [*Allege notice of injury, if required, as in Form 1406.*]

WHEREFORE, etc.

1440. By employee for injury from defective track (sustained in Lyman v. C. V. R. R., 59 Vt. 167; 10 A. 346).

I. [*As in Form 1433.*]

II. That at the times hereinafter mentioned plaintiff was employed by defendant as master and tender of the drawbridge at ..... forming a part of defendant's said road, and as such employee, in discharge of his duty, frequently passed over said road upon defendant's locomotives and cars from ..... to .....

III. That it became and was the duty of the defendant to provide a suitable, safe and sufficient roadbed and track, and to use due and proper skill, care and diligence in providing a

suitable, safe and sufficient roadway for the passage of said locomotives and cars to and fro over said railroad.

IV. That the said defendant, disregarding and neglecting its duty aforesaid, did not then and there provide a suitable, safe and sufficient roadbed and track for the passage of said locomotives and cars to and fro over said railroad; but, on the contrary thereof, did negligently and carelessly provide a roadbed and track which was insufficient, unsuitable and unsafe for the passage of locomotives and cars over the same, whereby and by means of the unsuitable, insufficient and unsafe condition of said roadbed and track, and on or about the .... day of ....., 19.., a certain locomotive of the defendant, whereon said plaintiff was then and there riding for the purpose of being able to attend to his duties at said drawbridge without delay, when the same should be reached by said locomotive, according to the course of his said employment and in pursuance of his duties therein, was thrown from the track and thrown down the embankment of said railroad.

V. [*Allege injuries and damage, and service of notice of injury, if required.*]

WHEREFORE, etc.

1441. By employee for injuries by collision.

I and II. [*As in Form 1439.*]

III. That it was a part of plaintiff's duty as such engineer, by reason of express regulations and directions given to plaintiff by the defendant, to stop his said train each day at ..... and there pass a certain other locomotive and train upon defendant's railroad which ran from ..... to .....

IV. That the defendant, on the .... day of ....., 19.., changed the place of meeting of said trains from ..... to ....., said change to take effect on the ensuing day, to-wit, on the .... day of ....., 19.., without giving the plaintiff notice of said change, by reason of which change, while the plaintiff was proceeding in the capacity of engineer of said locomotive, with the train thereto attached, from ..... to ..... on the .... day of ....., 19.., according to the previous express direction of said defendant, and while between ..... and ..... on said railroad, the plaintiff's train and said other train, with their locomotives, came into

collision without fault on the part of the plaintiff, and the plaintiff was severely injured [*state injuries*].

V. [*Allege notice, if necessary.*]

WHEREFORE, etc.

1442. By brakeman against corporation operating a logging railroad, alleging defective equipment and track (adapted from Haley v. Jump River L. Co., 81 Wis. 412; 51 N. W. 321, 956).

I. That at the times hereinafter mentioned the defendant was and still is a corporation organized under the laws of the state of ..... and was operating a logging railroad in the county of ..... in said state running from ..... to .....

II. That on and prior to the .... day of ....., 19.., the plaintiff was an employee of said defendant as a brakeman on defendant's trains on said logging railroad, and on said last named day was riding upon one of the logging trains of said defendant drawn by a locomotive engine over said logging railroad, engaged in the performance of his duties as brakeman aforesaid.

III. That the said defendant, on and prior to the date aforesaid, negligently failed to provide a safe and suitable roadbed for the track of said logging railroad, in that the same was very rough and uneven and allowed so to remain, and negligently failed to provide for any suitable or safe place upon its logging cars for the plaintiff to perform his duties as brakeman, and failed to provide suitable and safe appliances for fastening the logs upon its cars, and did not provide chains of sufficient strength for such purpose, but did provide certain weak, broken and patched chains totally insufficient and unsuitable for such purpose; and that for about ten days before said date the defendant negligently allowed several large logs to remain on said roadbed parallel with said track and so close thereto as to be an obstruction to cars loaded with logs thereon.

IV. That on said .... day of ....., 19.., said defendant was operating said railroad by its servants and agents, and transporting over the same said train composed of a number of cars, drawn by said locomotive engine, and that said cars were heavily loaded with logs, and that each load

was negligently and carelessly fastened upon the car upon which it rested by means of one of said weak, small, improper, and unsuitable chains; that this plaintiff, acting as the agent and servant of said defendant, and in the lawful and proper performance of his duty, was riding upon said train, and was standing at one of the brakes upon said cars; that while so riding as such agent and servant, and while so lawfully performing his said duty, and when said train was running over said railroad, and at a point about a mile and a half distant from the village of ..... in said ..... county, one of said loaded cars in front of the car upon which this plaintiff was so lawfully standing came in contact with one of the said logs so negligently allowed to remain alongside said railroad track, as aforesaid, the chain which bound the logs upon said car gave way and broke, and the said logs, which were bound by said chain to said car, fell, or partly fell, from the said car upon which they were loaded, and some of them falling with their front ends to the ground, or against said logs so negligently allowed to remain along-side said track, caused the logs upon the car upon which this plaintiff was standing to be thrown back upon him, so that this plaintiff was caught between two of said car-loads of logs, and by reason of the negligence of said defendant in so failing to provide suitable and proper chains to bind the logs upon said cars, and in so failing to keep its said roadbed in proper condition and free from obstruction, and with no want of care on his part, this plaintiff sustained the injuries hereinafter mentioned.

V and VI. [*State injuries received and damage, and service of notice, if required, as in Form 1406.*]

WHEREFORE, etc.

1443. Brakeman against railway company for injuries resulting from negligent condition of roadbed (adapted from Hulihan v. G. B. W. & St. P. Ry. Co., 58 Wis. 319; 17 N. W. 17).

I. [*As in Form 1433.*]

II. That the plaintiff, on and prior to the .... day of ....., 19.., was in the employ of the defendant as brakeman upon one of its freight trains, and that his duty as such required him to go between freight and other cars for the

purpose of coupling and uncoupling the same, using the appliances therefor provided by the defendant, and that it was the duty of the defendant to provide safe and suitable appliances therefor, and to keep its track in repair and free from obstructions, as well along the side of the track as within it, so as not unnecessarily to expose its employees to the danger of personal injuries.

III. That notwithstanding the said duty of the defendant, the defendant did, on or about the .... day of ....., 19.., and for a long time prior thereto, carelessly and negligently suffer and allow loose blocks of firewood and the like to lie scattered about near its track and along the roadbed near a station on said road called ....., upon the station grounds on the west side of the said station of ....., at a point where the said plaintiff and other brakemen were obliged, in performing their duties, to run along the side of said track and couple and uncouple cars, thereby rendering the performance of the plaintiff's duties unnecessarily dangerous to the plaintiff.

IV. That on or about said .... day of ....., 19.., and at or near the said place or station called ....., while the said plaintiff was in the employ of said defendant, as aforesaid, it became the duty of said plaintiff, as brakeman, and necessary that he should go quickly between a box car and a flat car to make a coupling, so called,—that is, to couple the box car which was being pushed towards the flat car which was standing to the flat car; that said plaintiff attempted to do so, as he was in duty bound to do, when his toe or foot struck against one of the said pieces or blocks of wood or fire-wood, without any negligence or carelessness on his part, but wholly through the shiftlessness and carelessness of the said defendant, as hereinbefore set forth, and said plaintiff was thrown with great force head-first in between said cars, and to save himself from being cut in two he caught hold of the draw-bar of the flat car at the same time as the draw-bar of the box or moving car came in collision with it smashing two fingers of the left hand of said plaintiff, and permanently and for life maiming and crippling a third finger, so that two fingers had to be cut off entirely, and the third left comparatively useless; that said accident was caused wholly by the shiftlessness and carelessness of said defendant in allowing its said track, and the margins thereof, to be

incumbered and obstructed by the said loose blocks of wood, and without any fault whatever on the part of said plain iff.

V. [*Allege service of notice, if required.*]

WHEREFORE, etc.

1444. By conductor of freight train for injuries from cattle chute dangerously near the track (adapted from Dorsey v. Philips & Colby Construction Co., 42 Wis. 583).

I. [*As in Form 1433.*]

II. That prior to the time hereinafter mentioned the defendant made and constructed a stock-yard near its track, in the town of ..... in said county, and to facilitate the loading of live-stock from the said yard into and upon its cars, a chute or passage-way was constructed by the defendant from the said yard to the track of said railroad, so that said live-stock could be driven from said yard across said chute and upon the cars of the defendant standing upon the said railroad in front of the said passage-way; and the plaintiff alleges that the said chute or passage-way was negligently and improperly built so as to project so near to the track of the said railroad as to greatly endanger the lives and persons of the servants and employees of the said defendant operating the freight trains over said railroad at the place where said chute or passage-way was located.

III. That on the .... day of ....., 19.., the plaintiff was in the employment of defendant in the capacity of conductor of a freight train then passing over and along said railroad, and that at a point a few rods north of the said stock-yard a side-track branched from the main line and ran past the said chute or passage-way to the depot in said town of .....; that in the course of the plaintiff's duty it was necessary for him to transfer a number of said cars from the said main line to the said side track, and to assist in the uncoupling of said cars; and that while in the act of thus assisting and in the exercise of due care and caution, the plaintiff in necessarily ascending to the top of one of said cars by means of the ladder on the side thereof, was carried by said car against said chute or passage-way, and pressed between the same and said car, by means whereof he was greatly bruised and wounded in his person, and one of his

legs crushed and broken [*allege other injuries, if any, and the damage suffered*].

IV. [*Allege notice of injury, if necessary.*]

WHEREFORE, etc.

1445. By a switchman injured by defective blocking of track (adapted from Paine v. Eastern Ry. Co., 91 Wis. 340; 64 N. W. 1005).

I. [*As in Form 1433.*]

II. That on and prior to the .... day of ....., 19.., the defendant owned and controlled a certain railway yard, tracks, frogs and switches therein, for the transaction of its business as a common carrier in the city of ....., together with the cars and locomotive engines thereon, and that on said .... day of ....., 19.., the plaintiff was in the employ of the defendant as a switchman in the said railway yard, and as such switchman was required to assist in the switching, braking and coupling of cars in the said yard, and on the said day it became and was his duty to accompany and set the brakes upon certain freight cars which were then being moved by the defendant and its servants through said yard and past a certain frog and guard-rail in said yard, near [*locate the place with exactness*].

III. That it was the duty of the defendant to keep the space between the guard-rail and the main rail at said point properly and sufficiently guarded or blocked, so as to prevent injury to employees, but the said defendant, not regarding its said duty, wrongfully and negligently neglected and omitted to properly and sufficiently guard or block said space, so that the said space became a dangerous trap to brakemen and other employees in the use of said yard, and in consequence of the said failure to block the said space the foot of the plaintiff while he was engaged in the proper discharge of his duty as aforesaid became caught and held fast in said space between the guard and main rail, whereby the plaintiff was held and run over by one of the cars of said defendant and suffered great injury [*detail injuries received*].

IV. That the defendant had notice and knowledge of the said defective condition of the said guard or block long

before the time of said injury, but that the said plaintiff had no knowledge thereof.

V. [*Allege notice, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1446. By brakeman for injuries from defective brake-beam (adapted from Wedgewood v. C. & N. W. Ry. Co., 41 Wis. 479).

I. [*As in Form 1433.*]

II. That the plaintiff, on and prior to the .... day of ....., 19.., was in the employ of the defendant as brakeman, running upon a freight train daily over that certain portion of the defendant's road from the city of ..... to the city of ..... and that it was the plaintiff's duty, when occasion should require, to go between the freight cars of said company and couple them together and uncouple them, with such machinery, appliances and fixtures as the defendant provided therefor; that in operating its said road it was the duty of the defendant to see that the cars and other rolling stock used thereon were safe and suitable for the business, so as not to unnecessarily endanger the lives and limbs of its employees and servants.

III. That on or about the .... day of ....., 19.., the defendant carelessly and negligently, and contrary to its said duty, did take upon its said road, and use and operate a certain freight car upon the brake-frame or brake-beam of which, at the end of said car, was a large and long bolt, which unnecessarily and carelessly was allowed to project beyond the frame or brake-beam, and in the way of the brake-man when about to couple or uncouple the car with another car; that the defendant negligently suffered the said bolt to remain without cutting off the projecting part thereof and without informing the plaintiff of its dangerous condition, although it had full knowledge thereof; that the plaintiff, while in the performance of his duties as brakeman aforesaid, at the station of ..... in the county of ....., and while going between said car and another car to couple them together, and in the exercise of due care, struck said projecting bolt with his foot, and was tripped and thrown down, and his leg crushed [*state the injuries received*].

IV. [*Allege service of notice, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1447. By section man for injury resulting from defective brake rod (adapted from Cowan v. C. M. & St. P., 80 Wis. 284; 50 N. W. 180).

I. That the defendant was, at the times hereinafter named, and still is, a railway corporation incorporated under the laws of this state, and engaged in operating passenger and freight cars upon railway tracks in said state, and especially through, to and from the city of Menomonie, in said state.

II. That at the time of the happening of the injury hereinafter stated, the plaintiff was in the employ of the defendant as a section man, and was required by his duties to be upon the tracks of the defendant at and about said city of .....

III. That on the .... day of ....., 19.., and for a long time prior thereto the defendant had negligently kept in its possession and used a freight car which was defective and unsafe in this particular, that an iron rod connected with the brake of said car and upon which tension was put in setting the brake, was unsafe and defective by reason of being broken nearly in two, which said broken condition had existed for a long time and was open and observable and easily discoverable upon inspection, and of which said breaking the defendant long prior to the happening of the injury hereinafter set forth had notice, and all of which was unknown to the plaintiff.

IV. That on the said .... day of ....., 19.., the defendant wrongfully and negligently had the said car in use upon one of its tracks at said city of ....., and was endeavoring to make a flying switch upon the side track at a brick-yard, about a mile and a half from which side track upon the main track there was a sharp descent, and upon making said flying switch defendant's employees detached said defective car from the others, and sent it down said descending track, unattended save by a person in charge of the said car, who could have stopped the car had not said brake-rod broken; that in attempting to set the brakes upon said car and stop the same, the said brake-rod broke at the said defective place hereinbefore mentioned, and the said car became unmanageable and rushed down said track and came upon the main track without the knowledge of the

plaintiff, who was lawfully upon the said track, and struck him [*state injuries received and damages resulting*].

V. [*Allege notice, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1448. By employee against railway company, for injuries by explosion of defective boiler.

I. [*As in Form 1433.*]

II. That the plaintiff, on the .... day of ....., 19.., at the time of the committing of the grievances hereinafter mentioned, was in the employment of the defendants, as fireman upon a locomotive engine, the property of the defendants, driven by steam upon their road; and it was the duty of the defendants to provide a good, safe, and secure locomotive, with good, safe, and secure machinery and apparatus.

III. That yet the defendants, not regarding their duty, conducted themselves so carelessly, negligently, and unskillfully in this behalf, that they provided and used an unsafe, defective, and insecure locomotive, of which they had notice.

IV. That for want of due care and attention to their duty in that behalf, on the day and at the place aforesaid, and while the said locomotive was in the use and service of the defendants upon their said railroad, and while the plaintiff was on the same in the capacity aforesaid, for the defendants, the boiler connected with the engine of the said locomotive, by reason of unsafeness, defectiveness, and insecurity thereof, exploded, whereby large quantities of steam and water escaped therefrom and fell upon the plaintiff [*allege injuries received*].

V. That by reason thereof the plaintiff became, and for a long time remained ill; and was obliged to, and did, expend about the sum of ..... dollars in attempting the cure of himself, and was for a number of weeks prevented from pursuing his business, and was otherwise injured, to his damage ..... dollars.

VI. [*Allege notice of injury, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1449. By stevedore against steamboat company, for injuries from falling through open hatchway (adapted from Haley v. Western Transit Co., 76 Wis. 344; 45 N. W. 16).

I. That the defendant was at the times hereinafter named, and now is, a corporation organized and existing under the laws of the state of ..... and engaged in the business of transporting goods for hire as a common carrier upon the Great Lakes, and that in the transaction of such business the defendant owns and operates a number of steamboats, and keeps a warehouse and depot in the city of .....; and among the steamboats so owned and used by the defendant is a steamboat called .....

II. That the plaintiff for more than three years last past has been a stevedore or laborer in said city, and was able to earn prior to his injuries hereinafter named the sum of twelve to fifteen dollars per week as such stevedore.

III. That on the .... day of ....., 19.., the said steamboat ..... arrived at said city of ....., with a load of goods and merchandise, and was moored at the said dock on said day, and on said day the plaintiff, with others, was employed to remove the cargo from said vessel, a part of which cargo was placed upon what is known as the main deck of said vessel, through which deck there is a large hatchway, several feet square, leading down to the hold of said vessel.

IV. That it is the custom of steamboats like the said ..... to keep such hatchways, when not in use, closed, and that it is also the custom when such hatchways are open at night to provide lamps on the sides thereof, but that the defendant on the night of said .... day of ..... negligently and wrongfully failed to place any cover or hatch on the said hatchway, but left the same open and unprotected, and without lights or lamps near the same.

V. That pursuant to his employment, the plaintiff went upon the said main deck of said steamboat, and commenced work in removing said cargo from said main deck shortly after eleven o'clock on the night aforesaid, and continued at such work until about half past one in the morning of the following day; that at about the time last aforesaid, and while still engaged in said work, and while he was necessarily and carefully passing along said main deck, with due care, he

accidentally fell through said open hatchway, and fell with great violence into the hold of said vessel, and struck upon his head, back and houlders and that until he fell into said hatchway he was wholly unaware of said danger, and wholly unaware that the said hatchway was open.

VI. [*State injuries received and damage suffered.*]

VII. [*Allege giving of notice, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1450. By brakeman for injury by negligence of engineer in operating freight engine (adapted from Baltzer v. Railway Co., 83 Wis. 459; 53 N. W. 885).

I. That at the times hereinafter mentioned, and prior thereto, the defendant was and still is a corporation engaged in operating a railroad running through the village of ..... in the state of .....

II. That on or about the .... day of ....., 19.., the plaintiff was an employee of said defendant as head brakeman on a freight train of said defendant, making regular trips from ..... in the state of ..... to ....., by way of the village of ..... aforesaid.

III. That on the said .... day of ....., 19.., at about .... o'clock in the morning, while it was still dark, and while the said train and its crew were employed in doing switching in the said village of ....., it became the duty of the plaintiff, together with the engine and the engineer operating said engine, to proceed, and they did go on to a certain side track of said defendant in the depot grounds of the said village of ....., to couple on to three flat cars that stood thereon near the extreme east end of said side track, and said engine was caused to go forward towards said cars on said side track with the front end forward.

IV. That the said engineer, while operating said engine on said side track, did carelessly and negligently cause said engine to run over said side track at an unusually fast rate of speed, and was not giving his attention to his duties while managing his said engine, and that this plaintiff stood upon the pilot of said engine, as it was necessary and proper for him to do in order to couple the said engine on to the said flat cars. That when said engine reached said cars the plaintiff proceeded to attempt to couple the said engine on the

said cars, as was his duty, and while in the act of attaching the pilot bar of said engine to the coupling head of said cars, the said engine being in motion, suddenly and without warning to this plaintiff the said engineer carelessly and negligently checked the speed of said engine with such force as to throw the plaintiff forward, causing him to fall between the engine and the car when they collided together, whereby the plaintiff's arm was caught between the engine and the car [*state other injuries received, if any*].

V. [*Allege service of notice, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1451. Against railway company for collision at crossing.

I. [*As in Form 1433.*]

II. That on the .... day of ....., 19.., the plaintiff was traveling, with due care, in a wagon drawn by two horses, along a public highway in the town of ..... in said county, which crosses said railroad about .... miles north of the city of ..... [*or otherwise describe and locate the crossing with certainty*]: and as plaintiff reached said public crossing defendant ran one of its locomotives, with a train of cars attached, across said highway at said crossing at a great and negligent rate of speed and without warning of any kind, so that by reason of the said negligent operation of said locomotive and train the said locomotive struck the horses which the plaintiff was driving, and killed them and destroyed the harness and wagon, and threw plaintiff out upon the ground with such force as to break his leg [*or otherwise state injuries*].

III. That plaintiff was the owner of said horses, harness and wagon and that the same were worth ..... dollars.

IV. That plaintiff necessarily spent ..... dollars for medical attendance and medicines in an endeavor to cure himself of said injuries, and for a period of .... months was unable to attend to his business as ..... in consequence of said injuries and is permanently injured so that he will never be able again to carry on said business as efficiently as before, and was otherwise greatly injured, all to his damage ..... dollars.

V. [*Allege notice, if necessary, to be served before action, as in Form 1406.*]

WHEREFORE, etc.

1452. The same, another form.

I. [*As in Form 1433.*]

II. That on the .... day of ....., 19.., the plaintiff was with due care traveling in a carriage drawn by two horses, all of which were his own property and of the value of ..... dollars, along a certain highway in the town [*or* city] of ..... known as ..... street [*or* extending from ..... to .....] which highway [*or* street] crosses the track of said railroad at a point [*describe point of crossing with certainty*], and as the plaintiff had reached said crossing the defendant negligently caused one of its locomotives, with a train of cars attached, to approach and rapidly pass the said crossing at a high and negligent rate of speed without sounding the whistle or ringing the bell, or otherwise notifying the plaintiff of the approach of said locomotive and train.

III. That the said track is so negligently constructed at said crossing that by reason of a sharp curve and deep cut the plaintiff was unable to see the said track from the highway on which he approached it, until he was upon the said crossing, and that by reason of the negligence of the defendant, its agents and servants, in running said train at said negligent rate of speed and in omitting to give warning by sounding the whistle or ringing the bell of said locomotive, the locomotive and train ran with great force into the plaintiff's said team, instantly killing said horses, breaking the said carriage and throwing the plaintiff to the ground with such violence as to break his right leg [*state injuries received*].

IV. That thereby the plaintiff lost said horses, and said carriage, was put to great expense of care and medical attendance, suffered great pain and anguish, was hindered and delayed in attending to his business [as a .....] and permanently lamed and crippled, so as to unfit him for carrying on said business, in all to his damage ..... dollars.

V. [*Allege notice of injury, if necessary, as in Form 1406*].

WHEREFORE, etc.

1453. The same, another form (adapted from Penna. R. R. Co. v. Krick, 47 Ind. 368).

I. [*Allege corporate character and business of defendant, the existence and location of the crossing and the fact of plaint-*

iff's approach to the same upon the highway, as in previous forms, and continue]:

II. That the defendant carelessly and negligently caused one of its locomotives, with a train of cars thereto attached, to approach said crossing from the west side thereof, and then and there to pass rapidly over the track of said railway, and negligently and carelessly omitted, while so approaching said crossing, to give any signal, by ringing the bell or sounding the steam whistle of said locomotive of the approach of said locomotive and cars, until the plaintiff was in the immediate vicinity and within twenty feet of said track, and wholly unable to check his said team and avoid a collision with said locomotive and train; that the plaintiff could not see said train, nor the track of said railway west of said crossing while he was approaching the same on account of buildings and hoop-poles and other material piled on the grounds of said railway with the knowledge and permission of defendant, on the west side of said crossing; and that by reason of the act of said defendant in causing said locomotive and train to pass over said crossing at a great rate of speed and without signals as aforesaid, the said locomotive and cars struck the plaintiff's carriage and horses [*allege injuries received and damages*]; that the said injuries were not caused by the want of ordinary care or diligence on the part of the plaintiff.

III. [*Allege notice, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1454. By passenger in street car against railway company whose engine negligently collided with with street car.

I. [*As in Form 1433.*]

II. That the defendant's said railway track crosses a public street in the city of ..... known as ..... street, upon which street there is and was at the times hereinafter mentioned a street railway operated by trolley cars, and that said defendant's said track and said street railway track cross each other at grade at said crossing.

III. That on the .... day of ....., 19.., at about the hour of .... o'clock p. m. the plaintiff was riding as a passenger upon one of said trolley cars upon said street railway track, and that as said trolley car was crossing the track of

said defendant company the said trolley car was run into and demolished by a locomotive operated by defendant's servants upon its said track.

IV. That the said collision between said locomotive and said trolley was caused wholly by the carelessness and negligence of the defendant and its servants in this, that the said defendant and its servants operating said locomotive gave no warning either by the blowing of a whistle or the ringing of a bell, of its approach to said crossing, and kept no lookout nor headlight upon the front of said locomotive while approaching said crossing, and caused the said locomotive to approach and pass said crossing at a negligent and unlawful rate of speed, to-wit, at the rate of .... miles per hour; and that solely in consequence of said various acts of negligence on the part of the defendant and its servants said trolley car was derailed and destroyed, and this plaintiff was severely injured, and his leg broken, [*allege injuries according to the fact, and resulting damage*].

V. [*Allege notice of injury, if required, as in Form 1406.*]

WHEREFORE, etc.

1455. By passenger against street railway company, for injuries from premature starting of car.

I. That at the times hereinafter mentioned the defendant was and still is a corporation organized and existing under and by virtue of the laws of the State of ..... and was and still is operating street cars propelled by electricity [*or* horses] upon certain streets in the city of ..... for the carriage of passengers for hire.

II. That on the .... day of ....., 19.., the plaintiff entered one of the cars of said company and became a passenger on said railroad, to be carried safely from the intersection of ..... and ..... streets to ..... street on said road, and paid his fare to the conductor of said car.

III. That upon reaching said ..... street, the plaintiff notified the conductor of said car of his desire to alight, and thereupon said conductor did stop said car, as requested, and while plaintiff was in the act of leaving the same, and without negligence on her part, said defendant, by its servant, the motorman upon said car, did so negligently and unskillfully control and manage said car and the machinery

thereof, that said car was suddenly and violently, and without notice or warning to plaintiff, started forward and along the track of said railroad, thereby violently throwing the plaintiff to the ground and [*allege injuries and damage*].

IV. [*Allege notice, if required, as in Form 1406.*]

[*If the injury was received while the passenger was boarding the car, insert in place of II and III the following*]:

II. That on the .... day of ....., 19.., one of defendant's street cars stopped to take on passengers at the corner of ..... and ..... streets in said city and the plaintiff attempted to step upon the rear platform of said car intending to become a passenger and take a seat in said car, and that while he was so attempting to step on said platform and before he had reasonable time to enter said car the motorman thereof suddenly and without warning and with a violent jerk started said car thereby throwing the plaintiff down [*allege injuries and damage*].

WHEREFORE, etc.

1456. The same, another form (adapted from Hardy v. Milwaukee Street Railway Co., 89 Wis. 183; 61 N. W. 771).

I. [*As in last preceding form.*]

II. That on the .... day of ....., 19.., the plaintiff entered one of the cars of defendant at the corner of ..... street and ..... street in said city, paid her fare, and was carried as a passenger from the said point of embarkation to the point where she desired to alight from said car; and that said car was in charge of a motorman on the front platform thereof and a conductor who collected fares and gave signals for the stopping and starting of said car, and whose duty it was to assist passengers on and off said car.

III. That when the plaintiff desired to alight from said car she gave the usual signal to the conductor, who transmitted the same to the motorman, and the said car was stopped by said motorman, and the plaintiff went to the rear end of said car to alight, and that while she was upon the platform of said car, and was about to step from the last step thereof to the ground, the said conductor and motorman caused said car to be suddenly started at a rapid rate of speed, by means whereof and without fault upon her part

the plaintiff was violently thrown upon the ground and [*state injuries and damages*].

IV. [*Allege giving of notice, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1457. By passenger against street railway company, for injuries resulting from defective insulation (adapted from Burt v. Douglas Co. Street Ry., 83 Wis. 229; 53 N. W. 447).

I. [*As in Form 1455.*]

II. That on the .... day of ....., 19.., the said defendant, for the purpose of carrying passengers as aforesaid, ran upon its said track two cars attached together so that persons could pass from one car to the other by taking hold of iron railings attached to the platforms of said cars, and by stepping from the step of one car to the step of the other while the said cars were in motion. That on said day it was exceedingly cold, and said defendant had, previous to said day, been in the habit of heating its said cars for the comfort of passengers, and had held out to the public that said cars would be so warmed.

III. That on said last mentioned day, at about the hour of .... o'clock in the evening, this plaintiff entered as a passenger upon a train composed of two of defendant's cars running upon ..... street in said city, which cars were attached together as aforesaid, and first went into the front car of said train and found that the same was cold and had no fire therein; that the plaintiff thereupon attempted to pass from said first car to the second car in the manner aforesaid, and as people had been accustomed and allowed to do for a long time previously; and that while he was so passing, and necessarily had hold of the iron railing aforesaid, the said defendant, negligently and carelessly allowed a dangerous and powerful current of electricity to pass down said iron railings and through the plaintiff's hands and body, whereby the plaintiff was paralyzed and unable to release his hold from said railing, and was dragged along between said cars and when the current of electricity was shut off was dropped between said cars and thereby greatly injured [*state injuries and damage*].

IV. [*Allege giving of notice, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1458. By administrator, for death of person killed by collision with street car (adapted from Thoresen, Adm. v. La Crosse City Ry. Co., 94 Wis. 129; 68 N. W. 548).

I. [*As in Form 1455.*]

II. That on the .... day of ...., 19.., at about the hour of .... o'clock in the evening the plaintiff's intestate, the said L.... M.... was traveling in a wagon drawn by one horse, in a public highway of said city known as ..... street, upon which the defendant operates one line of its said railroad, and was crossing ..... street in said city; and that as said L.... M.... was crossing the track of said defendant company at the intersection of said streets the defendant negligently caused one of its cars to approach and rapidly pass the said crossing, and carelessly omitted to ring the bell of said car, or otherwise warn the said L.... M.... of the approach of said car, or to stop at said crossing and permit the horse and wagon of and driven by said L.... M.... to safely pass the same.

III. That the said L.... M...., in the exercise of due care, was then and there crossing said street railway track riding in said wagon, when by reason of the said negligence of the defendant, its agents and servants, in running said car at a negligently rapid rate of speed and without stopping it at said street crossing, and omitting to give any warning of the approach of said car, the said car ran with great force into the wagon in which the said L.... M.... was riding, breaking the same and throwing the said L.... M.... to the ground with such violence as to fracture her skull and inflicting other injuries from which the said L.... M.... died on the .... day of ....., 19.., leaving her surviving the plaintiff, her husband.

IV. That thereafter, on the .... day of ....., 19.., such proceedings were duly had in the county court of ..... county that letters of administration upon the estate of said L.... M.... were duly granted to the plaintiff as sole administrator thereof, and that the plaintiff accepted said trust, and thereafter duly qualified and ever since has been and now is such administrator.

V. That the said L.... M.... at the time of her death was .... years of age, and in good health, and had been for

.... years previously engaged in the business of selling milk at said city, and that the management of said business depended upon her work and efforts; that the plaintiff, her husband, was at the time hereinbefore stated, and now is, in feeble health, and unable to support himself by his own work and labor, and that said L.... M.... by her labor, and from the profits of said business contributed to the support and maintenance of the plaintiff [*state damages suffered*].

VI. [*Allege notice, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1459. By administrator of a person killed by gross negligence of the motorman of an interurban street car (adapted from Wilson v. C. V. R. R., 120 Wis. 636; 98 N. W. 536).[11]

I. That at the times hereinafter mentioned the defendant was and still is a corporation organized and existing by virtue of the laws of the state of ..... and engaged in operating a street railway system by electric power in the cities of ..... and ..... together with an electric railway line extending between the said cities, upon which it has during said times run and operated electric cars in carrying passengers between said cities.

II. That on the .... day of ....., 19.., the plaintiff's intestate, one L.... M.... was traveling along a certain highway in the town of ..... extending from [*give terminal points of highway*] which highway crosses the said railway track of said defendant at [*locate the crossing*]; that said L.... M.... was driving in a westerly direction, riding in a cutter drawn by a team of horses, and while crossing the said railway track of the defendant on said highway, and in the exercise of due care, he was struck by one of the cars of the defendant company which was then proceeding in a southerly direction along said track over said crossing, and mortally injured so that he died upon the same day.

[11] In the case on which this form is based, it is held that under a complaint charging gross negligence no recovery can be had for mere want of ordinary care; in a subsequent case Rideout v. Winnebago Co. Traction Co., 123 Wis. 297; 101 N. W. 672, it is held that the two causes of action are inconsistent and not joinable in the same complaint.

III. That the said car of the defendant which struck the said L.... M.... was at said time in the care and management of a motorman and conductor, servants of said defendant, and that the said motorman and conductor in the operation of said car ran at a high rate of speed, to-wit, at the rate of more than 25 miles per hour, at the time the same was passing over said crossing, and failed and omitted to give any warning of the approach of said car; that the said servants of said defendant, before the said car reached said crossing, discovered the fact that said deceased was about to cross the same and was in great and imminent peril of being injured, and that the said servants had ample time to stop said car before reaching said crossing and striking the plaintiff's intestate, but that they and each of them made no attempt to stop said car but wantonly and wilfully ran the said car at said high rate of speed onto and against said deceased with a gross and utter disregard of human life.

IV. [*Allege appointment of administrator, and damages, as in last preceding form.*]

V. [*Allege notice, if necessary, as in following form.*]

WHEREFORE, etc.

1460. By infant, for injuries from being negligently run over by a street car.

I. That the plaintiff is an infant under the age of twenty-one years, to-wit, of the age of .... years, and that on the .... day of ....., 19.., on the application duly made A.... B.... was, by order of J.... K.... judge of the ..... court of ..... county duly appointed the guardian *ad litem* of this plaintiff, for the purposes of this action.

II. [*Allege incorporation and business of plaintiff as in Form 1433.*]

III. That on the .... day of ....., 19.., a certain car of the defendant, propelled by electricity, was by its servants being driven upon ..... street in said city in a southerly direction when the said infant plaintiff was lawfully passing said ..... street in a westerly direction at a point [*locate the point*] that the defendant, by its said servants, so negligently and carelessly propelled and conducted said street car that the same was driven with great force against and over said infant plaintiff, cutting off his left arm, and otherwise seriously and permanently injuring him.

IV. That in addition to the negligence hereinbefore mentioned, the defendant carelessly and negligently permitted said street car to become and remain out of repair, in that the brakes thereon had become weakened and unserviceable, so that they would not stop said car with reasonable certainty or celerity, or within a reasonable distance, yet that the defendant carelessly and negligently operated the same while said brakes were so defective and unserviceable, and its said servants so negligently conducted and operated said unsafe and unserviceable car, by reason whereof the same was driven against said infant plaintiff as aforesaid, causing the loss of his said arm, to his damage in the sum of ..... dollars.

[*Allege notice if necessary, as in Form 1406.*]

WHEREFORE, etc.

1461. Against railroad company, for negligently killing cattle; general form.

I. [*As in Form 1433.*]

II. That on the .... day of ....., 19.., the plaintiff was the owner and possessed of certain cattle, to-wit, [*designating them*] of the value of ..... dollars, and which cows and oxen casually and without the fault of the said plaintiff, strayed in and upon the track and ground occupied by the railroad of the said defendant at [*describe or locate place with certainty*].

III. That the said defendants, by their agents and servants, not regarding their duty in that respect, so carelessly and negligently ran and managed a certain locomotive and cars, which they were then and there operating over the said railroad track at a high and dangerous rate of speed, that the same ran against and over the said cows and oxen of the said plaintiff, and killed and destoryed the same, to the damage of the plaintiff ..... dollars.

IV. [*Allege notice, if necessary, as in following form.*]

WHEREFORE, etc.

1462. Against railroad company for killing stock, where road is not fenced, as required by law.[12]

I. That the defendant was at the times hereinafter mentioned, and still is, a railroad corporation organized under

the laws of the state of ..... operating a railroad through the said county of ..... and has been operating the said railroad continuously since about the .... day of ....., 19.., and for more than .... months prior to the .... day of ....., 19.. [*the day of the accident*].

II. That on the .... day of ....., 19.., three cows [*or otherwise describe stock killed*], the property of the plaintiff, of the value of ..... dollars, strayed upon the track and right of way of the defendant at a point about .... miles north of the city of ..... in said county and state [*describe place with certainty*], and were then and there negligently run over and killed by a locomotive and train of the defendant then being operated at a high and dangerous rate of speed over said road by the defendant.

III. That the said defendant for the space of six months prior to the said .... day of ....., 19.., had failed to fence its said track and right of way at the point aforesaid [*or* had failed to maintain and keep in repair the fence along its said track and right of way], and that the said cattle were so run over and killed in consequence of the said failure to fence [*or* to keep in repair the fence along] its said right of way at the point aforesaid, and the said negligent operation of the said locomotive and train.

IV. [*Allege service of notice of injury, as may be required by the particular statute, as for instance in Wisconsin. See Stats. 1913, sec. 1816b:*] That on the .... day of ....., 19.., and within one year from the happening of said acci-

[12] The statutes of the various states differ considerably in their requirements as to fencing and the steps necessary to fix liability for killing of animals by reason of failure to build or maintain fences and cattle guards. When a certain time is given in which to build a fence the complaint should show that the time has expired. Wis. Stats. 1913 secs. 1810-1813; 1816*b*; Ariz. R. S. 1913 sec. 3779; Ark. Dig. of Stats. 1904 sec. 6644; 6645; Cal. C. C. 1906 sec. 485; Colo. Stats. Ann. 1911 secs. 5478, 5479, 5479-A, 5479-B; Idaho Rev. Codes 1908 secs. 2814, 2815; Iowa Ann. Code 1897 sec. 2055; Kans. Gen. Stats. 1909 secs. 7075-7078; Mont. Rev. Codes 1907 sec. 4308; Minn. Gen. Stats. 1913 secs. 4263-4265; Mo. R. S. 1909 secs. 3145, 3146; Neb. R. S. 1913 secs. 6035, 6036; N. Dak. Rev. Codes 1905 secs. 4299-4301; S. Dak. C. C. 1908 sec. 542-544; and Chap. 218, Laws of 1907, S. Dak. Comp. Laws 1908 p. 443, v. 2. Okla. Comp. Laws 1909 sec. 7499-7501; Oregon Laws 1910 sec. 6978, 6979; Tex. Civ. Stats. Ann. 1913 art. 6596, 6603; Utah Comp. Laws 1907 sec. 456x, Wash. Rem. and Bal. Code 1910 secs. 8730-8731; Wyo. Comp. Stats. 1910, secs. 2593, 2594.

dent the plaintiff caused to be served upon the said defendant a notice in writing signed by the plaintiff, stating the time and place where such damage occurred, and that satisfaction is claimed of such corporation, a copy of which notice so served is attached hereto and marked "Exhibit A". [*See Form 78.*]

WHEREFORE [*Demand for judgment. If in Minnesota, demand double costs. Minn. Gen. Stats. 1913, sec. 4264*].

1463. The same; Iowa and Nebraska.

I and II. [*As in last preceding form.*]

III. That the point where the said cattle were so negligently run over and killed was a point on defendant's said railway where the defendant [*in Iowa say:* had a right to fence the same], [*in Nebraska say:* was required by law to fence the same but had not done so], and that said cattle were killed as aforesaid by reason of the defendant's said failure to fence said railway, and by the said negligent operation of said railway and train.

IV. [*If double damages are claimed, under Iowa Ann. Code, 1897, sec. 2055*]: That on the .... day of ....., 19.. [*more than thirty days before suit is brought*] plaintiff caused a written notice, accompanied with an affidavit of said killing of said cattle to be served on L.... M.... the station [*or* ticket] agent employed in the management of the business of the defendant at ..... in said county. Copies of said notice and affidavit are hereto annexed and made a part of this complaint, marked exhibits "A" and "B" respectively [*see Form 83, supra*]. That said defendant has neglected and refused to pay the value of said cattle.

WHEREFORE [*Demand for double damages*].

1464. Against railroad company for negligently setting fire.[13]

I. [*As in Form 1462.*]

II. That on the .... day of ....., 19.., the plaintiff was the owner [*or* lessee] and in possession of those certain prem-

[13] Under various statutes, when it is shown that a fire was kindled by sparks from the engine of a railway company, there is a presumption raised that it was the result of negligence. Wis. Stats. 1913 sec. 1816*a*; Colo. Code Ann. 1911 sec. 5511, 5512; Iowa Ann. Code 1897

ises described as [*insert description*] which premises immediately adjoin the lands and right of way of the defendant, and that there were on said premises at said time .... stacks of hay and a frame barn containing .... bushels of oats [*describe property burned*] all of which were the property of the plaintiff, and were of the value of ..... dollars.

III. That defendant, on an prior to said .... day of ....., 19.., negligently permitted dry grass, and other combustible material to accumulate and remain along its said right of way adjacent to plaintiff's premises, and that on said last named day the defendant's servants, while running one of its trains on said road, past plaintiff's said premises, negligently and carelessly managed said train, and failed to employ suitable appliances to prevent the escape of sparks and fire from the engine thereof, and negligently and carelessly allowed burning coals and fire to be thrown or dropped from said engine so that the same set fire to the said dry grass and other material so upon its right of way, and negligently and carelessly suffered said fire to escape from its right of way, and to spread upon plaintiff's said premises, whereby plaintiff's said barn and property aforesaid were burned and destroyed, to plaintiff's damage ..... dollars.

IV. [*Allege service of notice, if required, as in the forms immediately preceding.*]

WHEREFORE, etc.

1465. By servant against employer for injuries from defective or dangerous machinery; general form.

I. That at the times hereinafter named the defendant was and still is [a corporation organized and existing under the laws of the state of ..... and was] engaged in the business of manufacturing [*or otherwise state the business*] at ..... in said county of ..... [*If action is brought against a firm, allege partnership as in Form 872.*]

II. That on or about the .... day of ....., 19.., the plaintiff was employed by the defendant as a workman in defendant's factory at said ..... and was required to operate

sec. 2056; Kans. Gen. Stats. 1909 sec. 7079; Minn. Gen. Stats. 1913 sec. 4426; Mo. R. S. 1909 sec. 3151; N. Dak. Rev. Codes 1905 sec. 4303, 4304; S. Dak. Comp. Laws 1908 v. 2. p. 443, Chap. 215, Laws of 1907; Oregon Laws 1910 sec. 5515; Wyo. Comp. Stats. 1910 sec. 4205.

a certain dangerous machine in said factory, with rapidly revolving and unguarded gearing, called a planer [*or otherwise describe machinery*], and that plaintiff thereupon commenced to operate said machine and continued so to do until he received the injuries hereinafter described.

III. That it was the duty of the defendant to provide a safe and suitable machine for plaintiff's use as such employee, and to keep the same in proper repair, but that the said defendant on the contrary provided a machine which was defective and unsafe in this, that [*describe defect*] [*or if defect was the result of failure to repair*: but that said defendant, on the contrary, negligently allowed said machine to become defective, unsafe and out of order in this, *state defect*], all of which facts were known to the defendant but unknown to the plaintiff.

IV. That on the .... day of ....., 19.., while the plaintiff was engaged in the operation of said machine, in the performance of his duty and in the exercise of due care, and wholly on account of the defendant's said negligence, his right hand was caught in said defective and unguarded gearing [*or otherwise state the accident, according to the fact*], and was severed from the wrist [*allege other injuries received and damage*].

V. [*Allege notice, if necessary, before action, as in Form 1406.*]

WHEREFORE, etc.

1466. The same, by infant, or other person inexperienced in the use of tools, and who received no warning.

I. [*Allege infancy of plaintiff, and appointment of guardian ad litem, in case plaintiff is an infant, as in Form 863.*]

II and III. [*Follow I and II of last preceding form.*]

IV. That at the time of plaintiff's said employment he was [an infant] of the age of .... years, and was entirely inexperienced in the use of machinery of any kind and ignorant of the dangers surrounding the use of said machine, which facts were well known to the defendant, and that it was the duty of the defendant to instruct the plaintiff as to the proper manner of operating said machine and warn him of the danger incident to such operation, but that the defendant, on the contrary, negligently set the plaintiff at work upon said machine

without warning or instruction, and without explanation of the danger to an unskilled workman necessarily resulting from the management and operation of said machine.

V. [*As in allegation IV of last preceding form.*]

VI. [*Allege notice, if necessary, before action as in Form 1406.*]

WHEREFORE, etc.

1467. The same, machine defective and place unsafe.[14]

I. [*If plaintiff is an infant, allege infancy and appointment of guardian ad litem, as in Form 863.*]

II. [*Allege defendant's business, etc., as in allegation I of Form 1465.*]

III. That in the month of ....., 19.., the plaintiff was employed by defendant as a common laborer to do work in and about said factory, and that defendant had no experience in the use of machinery and was ignorant of the dangers incident thereto, which fact the defendant well knew.

IV. That notwithstanding the plaintiff's said ignorance and inexperience, the defendant on the .... day of ....., 19.., negligently set the plaintiff at work to oil certain rapidly revolving gearing and bearings in said mill while in motion [*or state the work according to the fact*] without giving the plaintiff any warning or explanation of the dangers of said work or informing the plaintiff that the same was dangerous.

V. That the said work was dangerous in this, that upon the said shaft so revolving there was, to the knowledge of defendant, a set screw projecting therefrom to the distance of an inch, which screw was entirely unguarded, and owing to the rapidity with which it revolved and the insufficiency of the light at that point was not discernible to the plaintiff in the performance of his duties. That said screw was so located that when the plaintiff was performing his duty of oiling the said shaft as aforesaid, his arm and sleeve necessarily came in close and dangerous proximity to the same, all of which

[14] For cases involving this principle, see Wolski v. Knapp-Stout Co., 90 Wis. 178; 63 N. W. 87; Thompson v. Johnston Bros. Co., 86 Wis. 576; 57 N. W. 298; Guinard v. Knapp-Stout Co. 90 Wis. 123; 62 N. W. 625; Kucera v. Merrill L. Co., 91 Wis. 637; 65 N. W. 374; Klatt v. Foster Lumber Co., 92 Wis. 622; 66 N. W. 793; Kutchera v. Goodwillie, 93 Wis. 448; 67 N. W. 729.

facts the defendant well knew, but the plaintiff had no knowledge thereof.

VI. That on the .... day of....., 19.., while the plaintiff was performing, with due care, his said duty of oiling said bearing and shaft in motion, and solely in consequence of the negligence aforesaid of the defendant in failing to warn the plaintiff and in allowing said set screw to remain unguarded, the sleeve of the plaintiff's blouse was caught by said set screw and his hand and arm were wound around said shaft and crushed, [*state injuries fully, and allege damage*].

VII. [*Allege notice, if necessary, to be served, as in Form 1406.*]

WHEREFORE, etc.

1468. By employee against employer for injuries from defective scaffold (adapted from Cadden v. Am. Steel B. Co., 88 Wis. 409).

I. [*As in I of Form 1465.*]

II. That on or about the .... day of ....., 19.., the plaintiff was employed by defendant as a riveter in the defendant's said factory, and that on the .... day of ....., 19.., it became the duty of plaintiff in the course of his said employment to go upon, and he did go upon an elevated scaffold or platform adjoining a certain steel barge then being constructed by the defendant for the purpose of riveting bolts upon said barge.

III. That it was defendant's duty to furnish to plaintiff a safe and secure platform or scaffold for the performance of his said work, but that the defendant on the contrary ordered and permitted two certain persons who were incompetent and unfit to construct such a scaffold and known to be so incompetent by the defendant, to erect and put said scaffold in position, and that the said defendant and its employees carelessly and negligently constructed and erected an unsafe, defective and dangerous scaffold, of all of which facts the plaintiff was ignorant.

IV. That the defendant failed to warn the plaintiff of the unsafe condition of said scaffold, and that solely by reason of the said dangerous and defective condition thereof the same tipped and fell while the plaintiff was upon the same in the performance of his said duties, on the .... day of .....,

19.., and the plaintiff was precipitated twenty feet to the earth, breaking his leg [*state injuries and damage*].

V. [*Allege notice, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1469. By employee against employer for injuries by obvious defects in machinery which defendant has promised to repair.

I and II. [*As in Form 1465.*]

III. That in operating said machine it was necessary for plaintiff frequently to pass and repass along a certain passageway on the east side thereof, of the width of but .... inches, projecting into which passageway was a certain rapidly revolving, uncovered and unguarded shingle saw propelled by steam. That the presence of said unguarded saw, and the narrowness of said passageway, as well as the slippery condition of the floor thereof by reason of accumulations of sawdust and bark, caused the use of said passageway to be unsafe and dangerous, all of which was well known to the defendant.

IV. That on the .... day of ....., 19.., the plaintiff informed the defendant of the dangerous condition of said saw and passageway, and requested that the same be repaired and made safe, and the defendant then and there promised to cover said saw and make said passageway safe, and that plaintiff, relying on said promise, as he lawfully might, remained in the defendant's employment and continued to operate said machine and use said dangerous passageway for the space of ..... hours. That defendant negligently failed to cover said saw or make safe said passageway, and in consequence of such failure and neglect by defendant, and while the plaintiff was still performing his duties in reliance upon said promise, and without fault on his part, he fell against said exposed saw, and [*state injuries received and damage*].

V. [*Allege notice, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1470. By employee against employer for injuries suffered by reason of employment of incompetent fellow-servant.

I and II. [*Allege business of defendant, and employment of*

plaintiff, substantially as in I and II of Form 1465, omitting statement that plaintiff was employed to work on a dangerous machine.]

III. That it was the duty of defendant to employ skillful and competent fellow-servants for plaintiff in said factory, but that defendant negligently employed one L.... M.... as engineer to operate the steam engine and boilers in said factory, who was incompetont in this, that [*state particulars of incompetency*], and that defendant well knew the incompetency and unfitness of said L.... M.... when he employed him, but that plaintiff was at all times wholly ignorant thereof.

IV. That on or about the .... day of ....., 19.., while plaintiff was performing his duties in said factory, said L.... M.... so negligently and unskillfully operated said engine and boilers, by reason of his said incompetence and unfitness, that the boiler exploded and plaintiff was thereby thrown to the floor and [*state the injuries received and damage*].

V. [*Allege notice, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1471. By minor servant against employer, for injuries received in driving dangerous horse (adapted from Craven v. Smith, 89 Wis. 119).

I. [*Allege infancy of plaintiff, and appointment of guardian ad litem, as in Form 863.*]

II. That on or about the .... day of ....., 19.., the plaintiff being then of the age of .... years, was employed by the defendant to perform labor upon the defendant's farm, as a common farm laborer, and that as a part of said employment the defendant on the .... day of ....., 19.., negligently required the plaintiff to ride and manage a certain horse belonging to the defendant, attached to a certain dangerous machine known as a corn-stalker and corn-cutter, having as a part of its mechanism sharp and dangerous knives.

III. That the said horse of the defendant was vicious and unmanageable, as the defendant well knew, and that the defendant negligently failed and neglected to provide the plaintiff with any proper appliance or apparatus to manage said horse or retaining his seat thereon, and also failed and

neglected to warn or inform the plaintiff of the vicious character of said horse and dangerous character of said machine, or of the precautions necessary to be used by the plaintiff in said employment, although the plaintiff was wholly ignorant as to the character of said horse, and the dangers attending the use of said machine.

IV. That while the plaintiff was so engaged in said employment, and was riding said horse with due care, the said horse became unmanageable and ran away, and the plaintiff was thrown from said horse in front of the said machine, and was severely injured [*state injuries and damage*].

V. [*Allege notice, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1472. By servant against employer for negligent exposure to infectious disease (adapted from Kliegel v. Aitken, 94 Wis. 432; 69 N. W. 67).[15]

I. That on or about the .... day of ....., 19.., the plaintiff was employed by the defendant to render assistance in and about the defendant's house, and in the care of defendant's minor daughter, whom the defendant represented to the plaintiff to be ill with nervous prostration.

II. That in truth and in fact the said daughter had been for some time ill with typhoid fever, a dangerous and infectious disease, which fact was unknown to the plaintiff, but well known to the defendant at the time aforesaid and the defendant negligently and falsely represented and stated to the plaintiff that his daughter's illness was nervous prostration for the purpose of inducing plaintiff to enter his service.

III. That at the time of entering said service the plaintiff was ignorant as to the appearance and effects of diseases, and particularly as to the appearance and effect of typhoid fever, and was unable to discern for herself the true nature of the illness of defendant's daughter, all of which was then well known to the defendant and that the plaintiff by reason of her said ignorance, relied upon defendant's representations as to the character of her said daughter's disease, and so relying, entered the service of the defendant as aforesaid.

[15] See Gilbert v. Hoffman, 66 Iowa, 205; 23 N. W. 632, where such an action by a guest who contracted small-pox in a hotel was sustained against the proprietor.

IV. That while the plaintiff was in such service, without negligence upon her part, and on or about the .... day of ....., 19.., she, the plaintiff, contracted the said disease of typhoid fever from the defendant's said daughter, and became seriously and dangerously ill and was confined to her bed for .... weeks, and suffered great bodily pain and mental anguish [*allege injuries and damage*].

V. [*Allege notice of injury, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1473. Against one who has placed an attractive and dangerous nuisance in the street, injuring child playing thereon (adapted from Busse v. Rogers, 120 Wis. 443; 98 N. W. 219).

I. That on the .... day of ....., 19.., and for a long time prior thereto, defendant was engaged in the lumber business in the city of ..... and maintained a lumber yard in said city, adjoining the north side of ..... street, in said city, which street is a main traveled thoroughfare and used by both pedestrians and vehicles, at all times of the day and night.

II. That several days prior to the said .... day of ....., 19.., the defendant caused a large number of timbers to be piled within the limits of said ..... street adjoining said lumber yard, said pile extending lengthwise of said street and being about four feet high; that defendant negligently and carelessly placed a large timber, about 14 feet long and 12 or 14 inches square, upon the top of said pile of said timbers, in such position that upon the slightest application of force said timber was liable to lose its position and fall over the edge of said pile; and that the defendant negligently and carelessly allowed said timber to remain and be in such position until the time of the injury hereinafter described, knowing the position of said timber to be unsafe and dangerous.

III. That there were at all times many families living in the vicinity of said lumber yard, and that the children of said families were accustomed to pass and repass on the north side of said ..... street and along said lumber yard, and were accustomed to play about the same, to the knowledge of the defendant.

IV. That on the said .... day of ....., 19.., while the plaintiff and other children were standing and playing upon the said pile of timber, the said timber upon the top of said pile became loosened and lost its equilibrium and fell upon the plaintiff, causing great injuries to her arm, and [*state injuries and damage*].

V. [*Allege notice of injury, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1474. Against druggist for negligently putting up a poisonous drug (adapted from Davis v. Guarnieri, 45 Ohio St. 470; 15 N. E. 350).

I. That at the times hereinafter mentioned the defendant was engaged in the business of selling drugs and filling medical prescriptions in the city of ..... in said state.

II. That on the .... day of ....., 19.., the plaintiff applied to the defendant to put up and sell to him .... cents worth of oil of sweet almonds, to be used by plaintiff as a physic, and that the defendant undertook and pretended to fill said order, but carelessly and negligently put up and delivered to the plaintiff instead of oil of sweet almonds, a certain poisonous drug known as oil of bitter almonds, and negligently failed to mark the bottle or package in any manner so as to indicate its dangerous or poisonous character.

III. That the plaintiff, believing the drug so delivered to him to be oil of sweet almonds, without fault or negligence on his part swallowed a part of the same and was thereby made violently ill and [*state injuries and damages*].

IV. [*Allege notice, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1475. For negligently leaving horses unhitched in the street.

I. That on the .... day of ....., 19.., the defendant, being the owner and in possession of a certain span of horses and wagon, drove the same onto ..... street in the city of ....., and carelessly and negligently left the same on said street without hitching or tying said horses in any manner and without leaving any one in charge thereof.

II. That, through the negligence of said defendant in not securing the same, said horses ran away with said wagon, and

struck and collided against the buggy of the plaintiff, in which he was riding in said street, and overturned the same and injured the plaintiff [*state injuries and damage*].

III. [*Allege notice, if necessary, as in Form 1406.*]

IV. [*If there be a city ordinance prohibiting the leaving of horses in the street unhitched it should be pleaded and its violation alleged.*]

WHEREFORE, etc.

1476. Against superintendent of hospital for improper treatment of a patient (sustained in Drefahl v. Connell, 85 Wis. 109; 55 N. W. 160).

I. That during all the time from ....., 19.., to ....., 19.., the defendant held the office of superintendent of the county hospital of the county of ..... and that during all of that time the plaintiff was lawfully an inmate of said hospital, and was afflicted with a disease affecting his legs.

II. That during all of said time it was the duty of said defendant, as such superintendent, to furnish to the plaintiff, as such inmate, a physician of reasonable and sufficient skill and experience, and such skillful and appropriate medical treatment as the nature of the plaintiff's case demanded, to furnish the plaintiff with food of the kind best suited to his debilitated condition, to maintain proper discipline among the inmates, officers, and employees of the hospital, so that the plaintiff might receive proper food and careful and considerate treatment; that during all of said time the defendant, as such superintendent, was well and sufficiently provided with all the assistant physicians, nurses, cooks, attendants, and servants and food and medicines required for the performance of his said duties, and had full control over them; that the defendant had full control of the furnishing of supplies of every kind for said hospital, and was in evefy way able to perform his said duties as such officer towards the plaintiff.

III. That, disregarding his said duties, the defendant neglected to give to the plaintiff sufficient and proper medical attendance; that he failed and neglected to provide for the plaintiff sufficient or suitable food, but furnished him food of a very coarse and indigestible kind, wholly unsuitable for his condition, and frequently furnished him ill-cooked and un-

wholesome food, by the use of which the plaintiff became greatly debilitated and suffered great pain, which is one of the causes of the plaintiff's failure to recover his health; that the defendant wholly failed to maintain proper discipline, whereby at meal times the stronger and more active inmates would rush to the table first, and take for themselves all the best portions of the food; that the plaintiff, being lamed and weak was frequently prevented from getting to the table in time to obtain proper food, but had to be content with the leavings, which were wholly unsuited to his physical condition; that the defendant wholly failed and neglected to exercise a proper supervision over his subordinates, but suffered them to grossly neglect their respective duties towards the plaintiff, and hence the plaintiff did not have the medical treatment his condition required, and continued to suffer, and did suffer, and does still suffer, great pain, both mentally and bodily, and continues ill from said sickness; that by reason of such neglect by the defendant the disease with which the plaintiff was afflicted grew much worse; that his body was much weaker and his general health greatly injured, that he suffered great bodily pain and mental anguish; that his disease has become so seated that he can never be cured, and will remain an invalid, and will be wholly dependent upon charity for support; and that he is a man about forty years of age, and has thereby sustained damage in the sum of ..... dollars.

WHEREFORE, etc.

1477. By tenant against landlord for leasing infected dwelling (adapted from Minor v. Sharon, 112 Mass. 477).

I. That on and prior to the .... day of ....., 19.., the defendant was the owner of a certain dwelling house in the city of ..... known as No. ..... on ..... street, and that prior to said date a number of cases of smallpox had occurred in said dwelling and had infected the same, to the knowledge of the defendant.

II. That on the .... day of ....., 19.., the defendant leased said dwelling house to the plaintiff as a residence for himself and his family and the plaintiff with his family thereupon moved into said house; that the plaintiff was wholly

ignorant of the infected and dangerous condition of said house at said time, and that the defendant negligently failed to inform the plaintiff that the said house was so infected and failed to take any precaution against the exposure of the plaintiff to said disease, and that the plaintiff by reason of residing in said infected house was made sick with said disease, and was confined to his bed for .... weeks, and [*state injuries and damage*].

WHEREFORE, etc.

1478. Outline of complaint against owner of apartment or tenement house for injury resulting from defective stairway or porch.

I. [*Allege defendant's ownership of the building at and prior to the time of the accident definitely describing the building.*]

II. [*Allege that the same was occupied by tenants of the defendant and that defendant had provided a stairway porch or other convenience according to the fact for the use of the tenants and all persons properly going to or from the apartments, or if it was only for the use of certain tenants state the fact.*]

III. [*Allege that prior to the accident the defendant negligently allowed the stairway or porch to become unsafe stating how, and that the condition was known to the defendant or would have been known had the defendant exercised reasonable care and diligence.*]

IV. [*Allege the accident giving such details as are necessary to show that it was caused by the defective conditions above referred to. Allege also the injuries to the plaintiff and the damage resulting.*]

V. [*Allege notice of injury if necessary as in Form 1406.*]

WHEREFORE, etc.

1479. For injury to shade trees by gas.

I. [*Allege incorporation of defendant as in Form 848.*]

II. That at the times hereinafter mentioned the defendant owned and operated a gas plant in the city of ....., state of ..... and furnished fuel and illuminating gas to the residents of said city by means of pipes laid under the surface of the streets of said city.

III. That during the year ..... and for a long time prior thereto the plaintiff owned and occupied the premises known as No. .... street in said city and owned six large ..... trees of the value of ..... dollars growing in the curb or boulevard along the sidewalk in front of said premises.

IV. That one of the defendant's gas mains was at that time maintained in the street in front of plaintiff's said premises and near said trees and that during said year the defendant negligently allowed gas to escape from said pipe and to diffuse itself through the earth reaching the roots of said trees whereby the same were killed to plaintiff's damage ..... dollars.

WHEREFORE, etc.

1480. Outline of complaint for injuries sustained from electric wire unguarded on the street.

I. [*Allege the corporate existence of the defendant electric company and its business.*]

II. [*Allege the existence of one of its electric lines upon the street where the accident happened.*]

III. [*Allege the circumstances of the accident, showing that the plaintiff was lawfully using the street and in the exercise of ordinary care, and came in contact with the electric wire charged with a heavy current.*]

IV. [*Allege the negligence of the defendant in allowing the wire to remain upon or close to the ground and state for how long a time that condition existed.*]

V. [*Allege the injuries received by the plaintiff and the amount of damage.*]

VI. [*Allege notice of the injury, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1481. Outline of complaint for negligent failure to shut off gas meter.

1. [*Allege that the defendant is a corporation as in Form 848, and that it was engaged in the business of selling gas and furnishing gas meters to its customers.*]

II. [*Allege the plaintiff's occupation of a house in the city and the fact that defendant maintained a gas meter therein.*]

III. [*Allege the removal by the defendant of said meter and the negligent failure to shut off the gas pipe or take proper precautions to prevent the escape of gas in the basement of the house, whereby the gas escaped in large quantities and was diffused through the house.*]

IV. [*Allege that the plaintiff being unaware of the presence of the gas lighted a match in one of the rooms of the house and by reason of the negligence of the defendant a violent explosion occurred.*]

V. [*Allege injuries and damage.*]

VI. [*Allege notice of the injury, if necessary, as in Form 1406.*]

WHEREFORE [*demand of money judgment*].

1482. Against street car company for colliding with automobile.

I. That at the times hereinafter named the defendant was and still is a corporation organized and existing under and by virtue of the laws of.....and operated an electric street railway on.....street in the city of.....

II. That on the....day of....., 19.., the plaintiff was driving an automobile easterly across the said..... street [*or* northerly along said street *as the case may be*] and at the same time the defendant drove one of its street cars southerly along said.....street near said intersection.

III. That the employees of the defendant in charge of said car then and there negligently operated and managed said car in this, *first*, that they drove said car at a dangerous and excessive speed, to-wit, at the rate of....miles per hour; *second* [*state other negligent acts or defaults*] and that by reason of the negligent operation of said car as aforesaid it struck the plaintiff's said automobile, throwing the plaintiff out upon the ground with great violence [*state injuries and damages*].

IV. That said automobile was of the value of..... dollars and was the property of the plaintiff and was rendered worthless [*or* damaged to the extent of..... dollars].

V. [*Allege notice of the injury if necessary as in Form 1406.*]

1483. For injury to traveler on highway from explosion on premises adjoining highway.

I. That at the times hereinafter mentioned there existed a highway in the city of.....much travelled at all times of night and day called....., extending from..... to.....

II. That on and prior to the....day of....., 19.., the defendant owned [*describe land*] adjoining said highway and operated upon said land [*state the industry whether it be a mine or any other industry in which the explosion occurred*] and that in the course of the operation of such industry defendant was accustomed to explode large quantities of dynamite whereby rocks and ore were hurled to great distances unless properly protected.

III. That on the day last named there were no protections or guards existing between said mine and said highway and that the plaintiff was on said day lawfully walking along said highway and that while he was so walking the defendant negligently exploded several charges of dynamite in said mine throwing large pieces of rock and ore through the air over and upon said highway one of which pieces struck the plaintiff.

IV. That the defendant was then and there negligent in this [*state negligence, whether in failure to guard the highway, using excessive charges, failure to cover and weight down the ground, failure to give warning or in other respects, or in all of them*] and that the plaintiff was struck and injured by reason of such negligence.

V. [*Allege injuries and damage.*]

VI. [*Allege notice of the injury if necessary as in Form 1406.*]

WHEREFORE, etc.

1484. By pedestrian run down in street against automobile owner.

I. That on the....day of....., 19.., the plaintiff was crossing a public highway known as.....street in the city of..... near [*state the place with reasonable certainty*] and that at the same time* the defendant was driving an automobile northward along said.....street near the place where the plaintiff was crossing the same.

II. That the defendant then and there negligently drove and managed said automobile in this that he drove the same at an excessive speed to-wit, at the rate of....miles per hour, and that he failed to sound the horn, or give any signal of its approach, and failed to slow down as he approached the plaintiff, [*if any other act of negligence is relied on state it*].

III. That by reason of the negligent driving and management of said automobile by the defendant as aforesaid the same then and there struck the plaintiff and struck the plaintiff and knocked him down [*state injuries*] to plaintiff's damage.....dollars.

IV. [*Allege notice of the injury, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1485. The same, when automobile was driven by servant.

I. [*Same as I in last preceding form to the* and continuing*]: a servant of the defendant in the course of his employment and while transacting the defendant's business was driving an automobile northward along said street near the place where the plaintiff was crossing the same.

II and III. [*As in II and III of last preceding form inserting the words "defendant's servant" in place of the word defendant.*]

IV. [*Allege notice of the injury if necessary as in Form 1406.*]

WHEREFORE, etc.

1486. Outline of complaint for negligence in failing to adopt rules for the safety of employees.

I. [*Allege employment of the plaintiff by the defendant at and prior to the time of the accident.*]

II. That defendant's business consisted of [*describe business fully showing such facts with regard to its complicated and dangerous character and number of servants employed that it would appear to be dangerous if no rules for safety in its conduct were adopted*].

III. [*Describe plaintiff's duties showing if possible why rules were necessary to protect him.*]

IV. That on the .... day of ....., 19.. while plaintiff in the course of his employment was [*state what plaintiff was doing and what happened showing the fact that it was due to lack of rules, also state the injuries received and the damages claimed*].

V. That it was the defendant's duty to adopt and enforce rules for the government and guidance of its servants in said work and especially a rule or rules providing [*name the rule needed to prevent such an accident*] but that the defendant negligently failed to adopt or enforce such rules, by reason of which neglect the plaintiff was injured as aforesaid.

VI. [*Allege notice of the injury, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1487. Outline of complaint for providing unsafe place to work.

I. [*Allege the defendant's business at the time of the accident and that plaintiff was in the defendant's employ in its factory or place of business.*]

II. That in the discharge of the plaintiff's duties in said factory it was necessary for the plaintiff to work [*or* the defendant required the plaintiff to work] [*state the place*]: that said place was not a reasonably safe place to work in this that [*state in what the danger consisted*] of all of which the defendant had knowledge.

III. That on the .... day of ....., 19.. while plaintiff was working in said place as servant of the defendant and in the regular course of his employment [*describe the accident fully and in such manner that it will appear that it was proximately caused by the unsafe character of the place of employment, also set forth the injuries and the damages*].

IV. That the plaintiff was injured as aforesaid by reason of the said negligence of the defendant in providing for the plaintiff said unsafe and dangerous place to work.

V. [*Allege notice of the injury, if necessary, as in Form 1406.*]

WHEREFORE, etc.

1488. For damages resulting from fall of a wall negligently allowed to stand after a fire.

I. [*Allege the plaintiff's ownership of the property injured by the falling wall describing the property.*]

II. [*Allege the defendant's ownership of adjoining property describing same and describing the building thereon prior to the fire.*]

III. That on the .... day of ....., 19.., the defendant's said building was totally destroyed by fire, save that the north wall of the same adjoining plaintiff's said building was left standing unsupported for .... days after the happening of said fire.

IV. That on the .... day of ....., 19.. the said wall so left standing, fell upon the plaintiff's said building; totally destroying the same [*or otherwise state the injuries according to the fact*].

V. That the defendants knew or ought to have known that said wall was very greatly weakened by said fire and was likely to fall at any time unless supported or braced, but notwithstanding the premises the said defendants negligently allowed the said wall to stand without supports or braces and by reason of said negligence the said wall fell as aforesaid.

VI. [*Set forth the damages.*]

VII. [*Allege notice of the injury if necessary as in Form 1406.*]

WHEREFORE, etc.

1489. Against agricultural society for injuries from fall of grand stand.

I. [*Allege incorporation of defendant as in Form 848.*]

II. [*Allege the purposes of the corporation and that it held its annual fair at the time and place of the accident.*]

III. [*Allege that plaintiff paid the admission fee charged and attended the fair on the day of the accident in order to witness the exhibition of stock and farm products.*]

IV. That the said defendant had theretofore prepared and erected a grand stand upon its said fair-grounds for the accommodation of its patrons and persons attending said fair, and negligently constructed and erected the same and used therein unsound and weak lumber, which was not suffi-

ciently strong to bear the weight of persons who might be seated thereon.

V. That the plaintiff, after entering said fair-grounds on the .... day of ....., 19.., was seated upon one of the seats of said grand stand and the same being unsound and weak as aforesaid broke and caused the plaintiff to fall the distance of about .... feet, without any fault or negligence on her part, whereby the plaintiff was greatly injured in her person in this, to-wit [*state injuries and damage*].

VI. [*Allege notice if necessary as in Form 1406.*]

WHEREFORE, etc.

1490. Against street railroad company for running down passenger who had just alighted from a car.

I. [*Allege corporate character of defendant as in Form 848, also that it was a common carrier of passengers on the streets of the city specifying particularly the street where the accident happened.*]

II. That on the .... day of ....., 19.., at about .... o'clock p. m., the plaintiff was a passenger on a north bound car of the defendant on said ..... street which car stopped at the crossing of ..... street for the purpose of receiving and discharging passengers.

III. That the plaintiff desiring to leave said car at said crossing got off the said car on the right side going north was struck by a south bound car, which approached without any signal or warning, at a dangerous and excessive rate of speed, hurling plaintiff violently upon the pavement of the street, seriously cutting and wounding him on the head and bruising and injuring him in the back, so that he was rendered unconscious, lame and sick, and unable to leave his room or attend to his business, and was obliged to expend one hundred dollars for medical and other services in attempting to get cured, and is still suffering from said injuries, and is permanently injured, to his damage in the sum of ..... dollars.

IV. That the defendant company was running said south bound car at a dangerous and reckless rate of speed, and that the motorman, in charge thereof, failed to sound the gong or give any signal or warning to plaintiff, and thereby caused

plaintiff to be struck as aforesaid, without plaintiff's fault.

V. [*Allege notice if necessary as in Form 1406.*]

WHEREFORE, etc.

1491. Against railroad company for starting a train before passenger had time to alight.

I. [*Allege incorporation of defendant as in Forms 848 or 849.*]

II. [*Allege that the defendant was at the date of the accident a common carrier and operated a railway between certain points for the carriage of passengers for hire.*]

III. [*Allege that on the day of the accident the plaintiff purchased a ticket at the defendant's station entitling him to passage on defendant's road to the point of destination and boarded one of defendant's trains and was received as a passenger thereon.*]

IV. That upon the arrival of said train at its said destination, to-wit....., the same was stopped at the defendant's passenger station and the plaintiff proceeded with due care to alight from said train when the servant of the said company who had charge of the said train, negligently and carelessly started the same before the plaintiff had time to get clear and out of the way thereof, whereby the plaintiff was thrown and fell between the platform and the said train without fault or negligence on his part.

V. That by said fall and the movement of the said train plaintiff was cut and bruised and was crushed between the platform and the said train and was seriously injured, and in consequence thereof the plaintiff was for six months ill and in suffering and was unable to attend to his said business for twelve months, and incurred medical and other expenses amounting to.....dollars. [*or otherwise state the injuries and damages*].

VI. [*Allege giving of notice if necessary as in Form 1406.*]

WHEREFORE, etc.

1492. Against a railroad company for violent ejection from freight train in motion.

I and II. [*As in last preceding form.*]

III. That on the....day of....., 19.., at....., the plaintiff boarded a freight train of the defendant in order

to ride thereon as a passenger, [and offered to pay his fare thereon to the station of....., which the conductor in charge of said train refused].

IV. That while said train was in motion and running at the rate of....miles per hour at a point [*describe same*] [the same not being a usual stopping place nor near any dwelling house] the conductor in charge of said train wantonly and willfully assaulted plaintiff, and threw plaintiff from said train, and caused him to fall between the cars, by which wanton and willful act of said conductor, he was thrown under the wheels of the moving train; his leg was broken in three places and mangled and crushed, his right foot was greatly injured, his left foot was mangled and partly cut off, and his head and back and shoulders were greatly brused and hurt [*or otherwise state the injuries according to the fact*].

V. That by reason of the aforesaid injuries plaintiff has suffered and still suffers great mental anguish and physical pain. [*State damage.*]

VI. [*Allege giving of notice if necessary as in Form 1406.*]

WHEREFORE, etc.

CHAPTER LX.

COMPLAINTS IN ACTIONS FOR NUISANCE.

1493. Complaint in action at law for abatement of nuisance from offensive trade, and to recover damages therefor.
1494. The same, another form.
1495. The same, with prayer for injunction.
1496. The same, to abate a soap factory.
1497. The same, against a continuer of a nuisance.
1498. The same, to abate gas works.
1499. The same, to abate a brickyard.
1500. Allegation of nuisance from rendering establishment.
1501. Allegation of nuisance from noise and vibration of heavy machinery.
1502. Allegation of nuisance from operation of limekiln.
1503. Allegation of nuisance by house of prostitution.
1504. For diverting water from plaintiff's mill.
1505. For erecting a dam, causing backwater.
1506. Against erector of a dam which is a nuisance.
1507. The same, where the land has been transferred.
1508. Allegation of special damage to plaintiff's land.
1509. For obstructing a private way.
1510. For damage from bursting of a reservoir.
1511. For obstructing street, causing injury to private person.
1512. Complaint in equity to enjoin nuisance caused by polluting waters of a stream by refuse of a starch factory.
1513. Complaint in equity by a city to enjoin erection of a building in a public street.
1514. Complaint in equity to enjoin threatened nuisance by deposit of garbage on neighboring lands.
1515. By town to enjoin erection of a fence in highway.
1516 For injunction against fouling a watercourse. (Connecticut Practice Act.)
1517. Outline of complaint for obstruction of a natural watercourse by a railroad embankment.
1518. For flowing water from adjoining roof on plaintiff's premises.
1519. Against city for maintenance of insufficient sewer.
1520. For maintaining private drain causing injury.
1521. For diverting water from a stream which plaintiff had used for irrigation purposes.

The statutes of many of the states covered by this work define a nuisance and provide for the abatement thereof and

the recovery of damages therefor at the suit of a private person specially injured by action at law, in which an injunction may also be obtained. Wis. Stats. 1913 sec. 3180; Cal. C. C. P. 1906 sec. 731; Idaho Rev. Codes 1908 sec. 4529; Minn. Gen. Stats. 1913 sec. 8085; Iowa Ann. Code 1897 sec. 4302; N. Dak. Rev. Codes 1905 sec. 7538; S. Dak. C. C. P. 1908 sec. 692; Okla. Comp. Laws 1909 sec. 4751; Oregon Laws 1900 sec. 341; Utah Comp. Laws 1907 sec. 3506; Wash. Rem. and Bal. Code 1910 sec. 943.

This statutory remedy by action at law does not, however, abrogate the remedy in equity if the injury be irreparable, or constant, and productive of interminable litigation. Wis. Stats. 1913 sec. 3180; Bushnell v. Robeson, 62 Iowa, 540; 17 N. W. 888.

1493. Complaint in action at law for abatement of nuisance from offensive trade, and to recover damages therefor.

I. That the plaintiff is, and for more than ..... years last past has been the owner of the following described premises [*describe same*] and during that time has occupied and now occupies the same as his homestead.

II. That the defendant for more than ..... years last past has been and still is in possession of certain premises contagious to [*or*, in the immediate vicinity of] the said premises of the plaintiff [and about ..... feet distant therefrom].

III. That said defendant, on or about the ..... day of ....., 19.., erected on his said premises a slaughter-house, and thereafter has * kept and slaughtered, and now keeps and slaughters, large numbers of cattle in said slaughter-house, causing noxious and offensive smells to come therefrom, tainting and corrupting the air in and about the plaintiff's premises, so as to render the dwelling-house and premises of the plaintiff unhealthy and unfit for occupation; that the offal, blood and other decaying matter thrown out and about said slaughter-house causes, and has ever since said erection of such slaughter-house caused, a nuisance greatly impairing the comfort and health of the plaintiff and his family, and has impaired the value of his said premises, and

hindered him from selling the same, as he much desires to do, to his damage ..... dollars.

IV. That the plaintiff, on the ..... day of ..... 19.., requested the said defendant to remove the said slaughter-house, or to abate the said nuisance, but the defendant refused so to do.

WHEREFORE the plaintiff demands judgment that the said nuisance be removed and abated, and that the plaintiff recover of the defendant the sum of ..... dollars, as aforesaid, as well as the costs of this action.

1494. The same, another form.

I. That the plaintiff, for ..... years last past, has been and still is lawfully possessed of a certain dwelling-house and appurtenances situate on lot ..... on block ..... in the city of ..... county of ....., in which dwelling-house the plaintiff then resided and still does reside with his family, and has carried on and still does carry on the business of a merchant selling dry goods and groceries, in which business the said plaintiff made large profits prior to the acts of the defendant hereinafter stated.

II. That the defendant, for ..... years last past has been and still is possessed of a certain piece of ground near the said dwelling-house of plaintiff, and about ..... feet distant therefrom, and on or about the ..... day of ....., 19.., erected on said piece of ground a slaughter-house, and cattle pens, and has wrongfully kept and continued the same, and on divers days during said time has slaughtered oxen, calves, sheep and hogs in said slaughter-house, and placed in and near the same large quantities of blood, garbage and offal arising from the carcasses of the animals so slaughtered, and wrongfully permitted the same to remain, thereby causing noxious and offensive smells and stenches arising from said blood, garbage and offal which have penetrated and still do penetrate the dwelling-house of plaintiff and rendered and do render the same unwholesome and uninhabitable, and did and still does greatly annoy, incommode and disturb the plaintiff and his family, and greatly injure the plaintiff in his business aforesaid, so that the same has been greatly decreased, and the plaintiff has been deprived of the profits

and gains thereof which he would otherwise have enjoyed; all to the plaintiff's damage in the sum of ..... dollars.

WHEREFORE [*demand for judgment as in Form 1493.*]

1495. The same, with prayer for injunction.

[*Follow either of the preceding forms, and insert in prayer for judgment after the demand for abatement*]: and that the defendant, his agents and servants, be perpetually enjoined from keeping or maintaining the said slaughter-house, etc.

1496. The same, to abate a soap factory.

I and II. [*As in first form in this chapter.*]

III. That the defendant, on or about the .... day of ....., 19.., erected on said premises a certain boiler and other apparatus for manufacturing soap, and thereupon began and has since continued and is now engaged in the boiling of large quantities of grease, dead carcasses, offal of beasts, and other dead animal matter on said premises, whereby many unwholesome and offensive smokes, and stenches have been and still are emitted, so that the air surrounding the premises of the plaintiff has been and still is filled and impregnated with the smokes, stenches, and rendered offensive and unhealthful, to the great injury of the plaintiff and his family.

IV. That by reason of said smokes, and stenches, entering the said dwelling-house of the plaintiff, the comfort of the plaintiff and his family, and their health, as well as the enjoyment of their said home, have been and are greatly impaired, and the value of said premises diminished, and he is thereby hindered from selling said premises, which he much desires to do; and [*here state other grounds of special damage*], to the plaintiff's damage ..... dollars.

WHEREFORE, etc. [*as in Form 1493.*]

1497. The same, against a continuer of a nuisance.

I and II. [*As in first form in this chapter.*]

III. That ever since the ..... day of ....., 19.., the defendant has maintained a slaughter-house on his said premises, and has [*continue as in Form 1058 from the* *].

IV. That on the .... day of ....., 19.., the plaintiff requested the defendant to remove the said slaughter-house,

or to cease using it for that purpose, but he has not done so.

[*Allege damages as in preceding forms.*]

WHEREFORE, etc. [*as in Form 1493.*]

1498. The same, to abate gas works (adapted from complaint in Bohan v. P. J. G. L. Co., 122 N. Y. 18; 25 N. E. 246).

[*After alleging corporate character of defendant, if necessary, and also plaintiff's and defendant's ownership of adjoining premises as in Form 1058, continue*]:

III. That about the year 19.., the defendant erected a new tank for the purpose of its gas works on its said premises, the side of which said tank stands within a few feet of plaintiff's said premises. That about the year 19.., the defendant began, and ever since has, and still does, make its gas at said works from naptha and that said tank was and still is used to store said naptha for purposes aforesaid. That the said naphtha is a noxious, offensive and sickening mineral substance, and destructive to the health and comfort of those required to remain in close proximity to it. That said tank was erected and is maintained in a negligent and unskillful manner, and by reason of the negligence and want of care in the construction, use, and maintenance of said tank, and the negligent and unskillful manufacture of gas from naptha, the defendant has, since the year 19.., and still does, maintain a nuisance injurious to the comfort enjoyment of said plaintiff, and injurious to the rental value of said premises, to plaintiff's damage ..... dollars.

WHEREFORE, etc. [*demand for judgment as in Form 1493.*]

1499. The same, to abate a brickyard (from complaint in Kirchgraber v. Doyd, 59 Mo. App. 59).

[*Allege ownership of adjoining lands, as in Form 1058, and continue*]:

III. That during the years 19.., and 19.., and up to the time of the commencement of this action the defendant has maintained and operated upon its said premises a large brickyard, with kilns for the burning of brick, and during said time has discharged and still does discharge from the said kilns large volumes of noxious and offensive smoke fumes

and gases upon the premises of the plaintiff, which said smoke fumes, vapors and gases have destroyed and still continue to destroy the crops of grain, vegetables and fruit growing on the plantiff's said land, and have during all of said time passed into and penetrated and still continue to pass into and penetrate the dwelling-house of the plaintiff upon said land, rendering the same unhealthy and unfit to live in, and destroying its usefulness as a residence for the plaintiff and his family, and greatly depreciating its value and salability; to the plaintiff's damage ..... dollars.

WHEREFORE, etc. [*demand for judgment as in Form 1493.*]

1500. Allegation of nuisance from rendering establishment.

[*After alleging the ownership and proximity of the plaintiff's and defendant's premises.*]

That about the month of ....., 19.., the defendants erected upon their said premises a building in which since the ....day of ....., 19.., they have been and are now conducting the trade or business of rendering the bodies of dead animals, rancid fat, tallow and offal and other animal substances, in great quantities; which said business has during all of said times caused and still continues to cause noisome and unhealthful odors and stenches to arise from said building, and to penetrate the plaintiff's said dwelling-house, so offensive in character as to render the occupancy of plaintiff's dwelling-house by himself and family inconvenient, annoying and unhealthy, and greatly to the injury of plaintiff's premises.

1501. Allegation of nuisance from noise and vibration of heavy machinery.

[*After alleging the ownership and proximity of plaintiff's and defendant's premises, for which see the preceding forms.*]

That since about the .... day of ....., 19.., the defendand has carried on and still carries on in certain buildings upon its said premises the business of manufacturing [*state what*] by the use of heavy hammers and other noisy machinery, which are used with great violence and frequency, and thereby has caused and still continues to cause vibrations of

the earth to take place and sundry great noises to continue night and day, and thereby has done great damage to the said dwelling-house of said plaintiff, in the sum of ..... dollars.

That said noises and vibrations have interfered with and still continue to interfere with the comfort of the plaintiff and his family, in the occupation of said dwelling-house, making it difficult for them to sleep, and making it uncomfortable and impossible to enjoy the ordinary use of said premises as a dwelling-house, and to pursue the ordinary occupations of life therein.

1502. Allegation of nuisance from operation of limekiln.

[*Allege ownership of adjoining premises as in preceding forms.*]

That on or about the .... day of ....., 19.., the defendant erected certain limekilns upon his said premises and near to the said dwelling-house of the plaintiff, and has operated and still continues to operate the same, and to send forth therefrom noxious and unhealthful smoke fumes, vapors and gases, which have continuously penetrated and do still penetrate the dwelling-house of the plaintiff, whereby the enjoyment by said plaintiff and his family of the said dwelling-house has been and is interfered with and said dwelling-house rendered unhealthful and uncomfortable for habitation, and greatly depreciated in value; to his damage in the sum of ..... dollars.

1503. Allegation of nuisance by house of prostitution.

[*Allege ownership of adjoining premises, as in preceding forms.*]

That about the month of ....., 19.., the defendant erected upon his said premises a building, and immediately occupied and has ever since and does now occupy the said building as a house of prostitution, and for the purpose of assignation and prostitution; and has and does therein maintain and carry on said immoral practices and maintain said house as a public resort for immoral, lewd and obscene purposes, and that defendant's said premises have been and are the resort, at all times of the night especially, of lewd, immoral and desolute characters, both male and female; that loud, offensive, disorderly and unseemly behavior is

constantly attendant thereupon, and assails the sight and hearing of plaintiff and his family, and visitors.

That by reason of the premises the comfortable use and enjoyment of said property of plaintiff has been and is and will be greatly interfered with and destroyed, the said property is rendered unsuitable and unsalable for residence purposes, and thereby greatly depreciated and lessened in value; to the plaintiff's damage to the amount of ..... dollars.

1504. For diverting water from plaintiff's mill.

I. That at all the times hereinafter mentioned the plaintiff was lawfully possessed [*if not in possession:* the owner in fee], of a water-mill, called a grist-mill [*or*, saw-mill, *or otherwise*], situated upon ..... brook [*naming the stream*], at [*stating location definitely, or stating name of mill*].

II. That the plaintiff then had a right to use and employ the water of said brook, and to have the same flow to and through his mill in a convenient and customary manner, according to the natural and usual flow of said brook, and without the hindrance of the defendant or any other person.

III. That on the .... day of ....., 19.., and on various days between that time and the .... day of ....., 19.., the defendant [knowing the premises, and intending to injure the plaintiff], wrongfully * dug up and removed the banks of said brook above said mill, and for .... days diverted the water [*or*, part of the water] thereof from running to and through said mill [*or*, built a dam across said brook above said mill, and for .... days stopped the water thereof from running to and through said mill].

IV. That by reason of such acts of the defendant, the plaintiff's mill, which was able, and before was used to grind .... bushels each day, thereafter and during the time aforesaid could only grind .... bushels, to the damage of the plaintiff ..... dollars. [*Or otherwise state the damage, according to the facts.*]

WHEREFORE, etc.

1505. For erecting a dam, causing backwater.

[*As in preceding form to the* *, *continuing*]: erected a dam and mill upon the same stream, a little below the plaintiff's

said mill, and has continued the same ever since, whereby the defendant causes a backwater that hinders a free course of said stream from the plaintiff's mill, causes the water of said creek to flow back upon the water wheels of plaintiff's mill to the depth of .... feet, greatly diminishing the power and capacity thereof, to the nuisance of his mill, and to the hindrance of his business, to his damage ..... dollars [*or conclude with paragraph IV of last preceding form*].

WHEREFORE, etc.

1506. Against erector of a dam which is a nuisance.

I. That the plaintiff is, and at the times hereinafter mentioned was, the owner of the freehold of certain lands in ..... with dwelling-house thereon, known as [*designating the premises*].

II. That in the month of ....., 19.., the defendant wrongfully raised a dam [*or*, a pool of water] upon his freehold, in the vicinity of the plaintiff's land, whereby * the water was flowed thereon [*or*, on the plaintiff's freehold] to the nuisance of plaintiff's said freehold, and still flows thereon, to his damage ..... dollars.

WHEREFORE the plaintiff demands judgment that the said nuisance be abated and removed, and that the plaintiff recover of the defendant ..... dollars damages caused thereby, and the costs of this action.

1507. The same, where the land has been transferred.

[*Insert after paragraph II in preceding form:*]

III. That on or about the .... day of ....., 19.., the defendant [*erector*] conveyed said freehold to the defendant [*continuer*] who, from that time ever since, has been in possession of said freehold and dam, and wrongfully maintains said nuisance; although, on the .... day of ....., 19.., and before this action, he was by plaintiff requested to remove and abate the same.

1508. Allegation of special damage to plaintiff's land.

[*Conclude paragraph II in Form 1506 from the *, e. g. thus*]: whereby the plaintiff's grass, of the value of ..... dollars, then growing on said meadow, was spoiled, and his meadow made spongy, rotten, and good for nothing; and forty

lengths of plaintiff's fence, of the value of ..... dollars, have been taken up and carried away.

1509. For obstructing a private way.

I. That the plaintiff, at the time hereinafter mentioned, was [and still is] possessed of [*here describe his premises, e. g.*, a meadow in the town of ..... and county of .....] and had a right of way therefrom over the adjoining land to the highway [*or*, to other land of the plaintiff] to pass and repass on foot freely at all times [*or*, with horses, *or*, with carts, *designating the use of the way according to the fact*].

II. That the defendant, on the .... day of ....., 19.., and at other times thereafter, and before this action, wrongfully obstructed said way by [building a fence across it] whereby the plaintiff was for a long time [*or*, was and still is prevented from enjoying said way, to his damage ..... dollars.

[*Allege other and special damage, if any.*]

WHEREFORE, etc.

1510. For damage from bursting of a reservoir (sustained in Hoffman v. T. C. W. Co., 10 Cal. 413).

I. That on or about the ....day of ....., 19.., the plaintiff was and still is the owner of [*describe property*] situated at .....

II. That on or about the .... day of ....., 19.., the defendant had erected and was the owner of a reservoir situated [*describe location and its proximity to plaintiff's property*] wherein was collected a large body of water, which would otherwise have flowed away in natural channels.

III. That on or about said .... day of ....., 19.., the defendant's said reservoir by reason of some defect in its construction, insufficiency for the purpose for which it was constructed, or carelessness and mismanagement on the part of the said defendant, broke away and the water therein contained flowed down upon and over plaintiff's said lands.

IV. [*Allege damage sustained.*]

WHEREFORE, etc.

1511. For obstructing street, causing injury to private person.

I. That at and before the times hereinafter mentioned there was and ever since has been a certain public highway [*or* street, *if in a town or city*] called ..... street in the city of ..... state of .....

II. That the said defendant on the .... day of ....., 19.., wrongfully caused to be placed large quantities of dirt, rubbish, stones and other materials in said public highway [*or* street], thereby rendering the same dangerous for public travel.

III. That the plaintiff on the .... day of ....., 19.., was lawfully passing in and along said highway [*or* street] in a certain carriage drawn by horses, and was then and there by reason of said rubbish and material so wrongfully placed in said highway [*or* street] with great force and violence overturned, without the fault or negligence of the plaintiff and his said wagon was broken and greatly injured, and he was seriously injured in and about his person [*state bodily injuries received*] whereby he was put to great expense in curing his said injuries and repairing his said carriage, to-wit, in the sum of ..... dollars, and was rendered unable to attend to his usual business for the space of .... days, to his damage ..... dollars.

WHEREFORE, etc. [*prayer for abatement and damages, as in Form 1506.*]

1512. Complaint in equity to enjoin nuisance caused by polluting waters of a stream by refuse of a starch factory (adapted from Middlestadt v. W. S. & P. Co., 93 Wis. 1; 66 N. W. 713).

I. That the plaintiff for .... years last past has been and now is the owner of a farm in ..... county, described as follows [*insert description*] upon which are the plaintiff's home and farm buildings, and where the plaintiff with his family has at all times resided and still continues to reside.

II. That the said farm is situated on the ..... river, about one-half mile of the boundary line thereof being the thread or center of said river, and that said river is a public navigable river running through said county, and mostly consisting of spring water, and except for the acts of the

defendant hereinafter named, of a clear and healthy quality and suitable for use for domestic and farm purposes.

III. That the defendant for . . . years last past has owned and operated and still owns and operates a large manufacturing establishment upon the bank of said river several miles up stream from plaintiff's said farm, and that said defendant has continuously during said .... years wrongfully and negligently thrown and emptied into said river, and continues to empty therein, large quantities of slops, garbage, refuse, offal, starch, rotten potatoes and pulp, which are offensive and unhealthful; and have been and are carried down stream, polluting the waters of said river, and especially along and in front of the plaintiff's said farm, generating a poisonous scum thereon and infecting the air with offensive and noxious smells and miasma, to the great injury and detriment of the plaintiff and his family.

IV. That the plaintiff has suffered and still suffers a special and peculiar injury resulting from the said wrongful acts of the defendant in that he is now and has been during all of said time deprived of the use of the water of said river for farm and domestic purposes, and deprived from cutting ice thereon, and in that the waters of said river have been and are rendered unwholesome and poisonous, and that the air surrounding the plaintiff's said dwelling has been and is rendered unhealthful, thus reducing the value of his said farm in the sum of ..... dollars, making his said home unfit for habitation for himself and his family, all to the great damage of the plaintiff.

V. That the said nuisance is continuous and constantly recurring, and that it will work an irreparable injury to the plaintiff and to his said farm, and will result in interminable litigation unless the plaintiff have relief in equity, and that the plaintiff has no adequate remedy at law; that the defendant threatens and gives out that he will continue to operate said factory and empty the said slops and refuse in the said river in the future in the same manner as heretofore, and that the plaintiff believes and fears that he will do so unless restrained by the injunctional order of this court.

WHEREFORE the plaintiff demands judgment that the said defendant, his agents and servants, be perpetually enjoined and restrained from emptying or throwing any of said slops or refuse matter into said river, that a temporary

injunctional order issue in this cause, that the plaintiff have judgment against the defendant for his damages already suffered, to-wit, the sum of ..... dollars, with costs, and that he have such further or other relief as may be just and equitable.

1513. Complaint in equity by a city to enjoin erection of a building in a public street (adapted from Racine v. J. I. Case Plow Co., 56 Wis. 539; 14 N. W. 599).

I. That the plaintiff is now, and since the .... day of ....., 19.., has been a municipal corporation organized and existing under and by virtue of chapter .... of the laws of the state of .....

II. That there is now and for .... years last past has been a public street and highway existing in the said city known as ..... street, ... feet in width and extending from [*describe street*] which has been and now is a public highway of great importance and largely and constantly used by teams and foot passengers for the purpose of travel and trade.

III. That on or about the .... day of ....., 19.., the defendant caused to be made an excavation about .... feet long and .... feet in width in said street [*describe location*] and to lay walls and foundations in said excavation, and is continuing to build said walls and foundations, and gives out and states that he will immediately erect thereon a permanent building of one or more stories in height whereby said street will be greatly impaired in its usefulness and the width thereof reduced to .... feet, and the same will be rendered less convenient for public travel and convenience.

IV. That this plaintiff has duly notified said defendant not to erect said building, but that defendant threatens to continue and complete the same, and that the plaintiff fears and believes that he will do so, thereby causing a multiplicity of suits and working an irreparable injury to the plaintiff; that the plaintiff has no adequate remedy at law.

WHEREFORE, etc. [*prayer for perpetual injunction.*]

1514. Complaint in equity to enjoin threatened nuisance by deposit of garbage on neighboring lands.

I and II. [*As in Form 1493.*]

III. That defendant in or about the month of ....., 19.., began to deposit on his said lot, and still continues to deposit thereon large quantities of garbage, offal, manure, decayed begetables and animal matter, and allow others to deposit such articles and material thereon, and gives out and threatens that he intends to continue to use said lot for the purpose of depositing said garbage and other material thereon.

IV. That the effect of such deposit of garbage and other material on said lot has been and in the future will continue to be to fill the air in and about the plaintiff's said dwelling-house with offensive and unhealthy stenches, and to endanger the plaintiff's health and that of his family, to their great annoyance and discomfort, and to the irreparable injury of the plaintiff, by rendering his house uninhabitable and greatly diminishing the value thereof.

WHEREFORE the plaintiff demands judgment: (1) that the defendant and all persons claiming or acting under him be perpetually enjoined and restrained from using or permitting the use of said lot and premises for the uses aforesaid; (2) for the costs and disbursements of this action; (3) for such other or further relief as may be equitable.

1515. By town to enjoin erection of a fence in highway.

I and II. [*As in Form 1513 changing the allegations so as to show that the plaintiff is a town and not a city.*]

III. That on ....., 19.., defendant wrongfully entered upon said highway where the same crosses certain land owned by him [*describing it*] and then and there built an obstruction thereon consisting of a fence .... feet high and .... feet long, so as to obstruct and prevent public travel thereon.

IV. That on ....., 19.., plaintiff removed said obstruction but shortly thereafter defendant wrongfully renewed it, and that defendant threatens to and will, unless restrained by order of this court, maintain said obstruction, and plaintiff is without adequate remedy at law.

V. That plaintiff necessarily expended ..... dollars in removing said original obstruction and in repairs on said road rendered necessary by said obstruction.

THEREFORE, etc. [*prayer for perpetual injunction.*]

1516. For injunction against fouling a watercourse (Conn. Pr. Act form 327).

I. That at the times hereinafter named plaintiff owned and still owns a farm in ..... county, consisting of [*describe land*].

II. That through said farm there flows and has ever flowed a stream known as ..... brook.

III. That defendant owns a paper mill on said brook at a point above plaintiff's farm which he has operated as such since ....., 19..

IV. That during the last few months defendant has used, in the operation of said mill, various noxious chemical substances and fluids for cleaning rags, and has allowed the same, after they have been so used, to be thrown into or mixed with the water of said creek, whereby such water has been greatly fouled.

V. That before that time plaintiff had always watered his stock at said creek, and had also carried the water therefrom into his house, by pipes, and was using it for his domestic purposes.

VI. That since defendant has discharged such substances in said creek as aforesaid the water thereof, where it enters plaintiff's said farm, and throughout its entire course through the same, is so foul and unwholesome, that he has been and is unable to use it either for his stock or his domestic purposes.

VII. That on ....., 19.., plaintiff notified defendant of such injury to the water of the creek and requested him to desist from any such use of the creek thereafter, but he still continues said nuisance.

VIII. That plaintiff has already been damaged thereby to the extent of ..... dollars, and if said nuisance is continued indefinitely said farm will be greatly reduced in value.

WHEREFORE plaintiff demands judgment permanently enjoining defendant from continuing said nuisance, and for ..... dollars damages, with costs.

1517. Outline of complaint for obstruction of a natural watercourse by a railroad embankment.

I. [*Allege corporate existence of the defendant as in Form 848 or 849.*]

II. [*Allege the plaintiff's ownership of the land through which the water course runs.*]

III. [*Allege that the defendant constructed a railroad through or along the side of plaintiff's land giving the date and that it has ever since maintained the same.*]

IV. [*Allege that prior to the construction of the railroad a natural water course ran through plaintiff's land, describing its course, but that the defendant in constructing its railroad built and maintains an embankment or dike across the natural flow of said watercourse which causes the water therein to rise and overflow the plaintiff's land and remain stagnant thereon for months at a time, etc.*]

V. [*Allege the impairment in value of the land and the amount thereof.*]

WHEREFORE, etc.

1518. For flowing water from adjoining roof on plaintiff's premises.

I. That on or about the .... day of ....., 19.., the plaintiff was the owner in fee of a dwelling-house and premises known as No. ...., ... street, in the city of ....., in which the plaintiff and his family then resided.

II. That on or about said date the defendant wrongfully erected a building so near to the said dwelling-house of the plaintiff, and in so careless and improper a manner, that by reason thereof, on said day, and on divers other times afterwards and before this action, large quantities of rainwater ran from said building and from the gutters thereof upon and into to the said dwelling-house and premises of the plaintiff, whereby the walls, ceilings, papering and other parts thereof were wet and damaged, and said dwelling became unfit for habitation, to the plaintiff's damage ..... dollars.

WHEREFORE, etc. [*as in Form 1493*].

1519. Against city for maintenance of insufficient sewer.

I. [*Allege corporate capacity of defendant city.*]

II. [*Allege plaintiff's ownership of the building or dwelling which has been flooded or polluted with sewage.*]

III. [*Allege the construction of the sewer in question by the city and proceed*]: and that the said drain or sewer was so constructed and located that thereby in and through it a large amount of rain and waste water, and of material of a filthy and noxious character [which said sewer or drain was built for the purpose of receiving and removing] is received from the localities which it drains. That in consequence of the inadequate and insufficient size and plan of said sewer and of the defective construction thereof, caused by the negligence, ignorance, carelessness and fault of said defendant's officers and agents, the said sewer repeatedly, during the years ...., to .... inclusive, while plaintiff was the owner of the aforesaid property, and more especially so at the time of rainstorm in said period, did overflow and cast its filthy contents upon and into plaintiff's premises, injuring the same and destroying this plaintiff's goods and chattels in said premises contained and kept, and that thereby, and by reason of the foul and unhealthy atmosphere caused as aforesaid, plaintiff and his family have been greatly injured in their health and comfort, and part of his said property has not been tenantable but unproductive.

IV. That the said drain or sewer was constructed and built as aforesaid of inadequate size and upon a defective plan and was without any proper and sufficient means and provisions for carrying off and discharging such matter by it collected as aforesaid, and that it was so located and built, through the negligence, default and miscarriage of the officers and agents of the defendant, and specifying certain respects wherein such officers and agents were negligent as aforesaid, plaintiff says that the said drain was built of insufficient capacity, strength and durability, and [*specify any other particulars in which there were defects of construction*].

V. That the officers and agents of defendants having the control and management of the building and location of said sewer, and through whose agency, negligence, default and misconduct the injury aforesaid was caused, were officers of the defendant city charged by law with the duty of constructing said sewer.

VI. That the said defendant had notice of the said damage and the cause thereof, and that they, said defendants, have neglected and refused to give any relief in the matter whatsoever.

VII. That by reason of the negligent acts aforesaid the plaintiff has been damaged, as heretofore stated, in the sum of ..... dollars.

WHEREFORE, etc.

1520. For maintaining private drain causing injury.

I. [*Allege plaintiff's ownership and occupancy of premises injured.*]

II. [*Allege defendant's ownership or occupancy of premises from which drain is laid.*]

III. That on or about the .... day of ....., 19.., the defendant, being in possession of the tract of land last aforesaid, did wrongfully excavate and lay drains from said tract of land, then and now in possession of the defendant, across the aforesaid street, extending the same upon the building lots of the plaintiff, heretofore described, and wrongfully and maliciously caused the same to be discharged and to flow upon the building lots aforesaid of the plaintiff, and unlawfully permitted, and does still permit, said pipe and flow of water, drainage and sewerage, to remain and continue upon plaintiff's lots, thereby rendering said lots unfit for business purposes, to the great damage of the plaintiff.

IV. [*Allege damage sustained*].

WHEREFORE, etc. [*as in Form 1493*].

1521. For diverting water from a stream which plaintiff had used for irrigation purposes (adapted from Shotwell v. Dodge, 8 Wash. 337; 36 Pac. Rep. 254).

I. That the plaintiffs are the owners of a certain tract of land consisting of [*description*], and were in possession of the same since the .... day of ....., 19..; that the defendants own, and are in possession of land adjoining and immediately north of the premises aforesaid of the plaintiffs; that through the land of both parties, as aforesaid, a stream has at all times flowed from north to south in a well-defined channel protected by natural banks.

II. That in the month of ....., 19.., the plaintiffs built a dam across the said stream upon their lands and constructed various ditches therefrom to irrigate their lands in connection with their farming operations in raising crops and

also for the purposes of conveying the water from said stream to their dwellings and barns, to use the same for domestic purposes; that plaintiffs' said land was theretofore entirely dry and without irrigation, and was non-productive.

III. That by the construction of said dam and the consequent diversion of the waters of said stream to the plaintiff's said premises the plaintiff during the said month of ....., 19.., appropriated all the waters of said [stream] to his own use, and from that time till the time hereinafter mentioned has continuously used the same.

IV. That in 19.., the defendants wrongfully built a dam across the said creek on their said land, whereby they completely stopped the water from flowing in its accustomed channels through plaintiffs' land as it was accustomed to flow, and from flowing into and through the plaintiffs' ditch; that in connection with this said dam the defendants also, at said time, constructed a ditch that carried the water of said creek eastward over their own land where they permitted it to scatter and waste without providing any artificial channel for its return to the bed of the said creek.

WHEREFORE, etc.

CHAPTER LXI.

COMPLAINTS IN ACTIONS FOR WASTE.

1522. By lessor against lessee for damages. (Wisconsin.)
1523. By remainderman under will against life tenant. (Wisconsin.)
1524. By ward against guardian. (Wisconsin.)
1525. By joint tenant or tenant in common against cotenant.
1526. By heirs against dowress. (Wisconsin.)
1527. By reversioner against assignee of life estate.
1528. By purchaser at sheriff's sale for waste committed before conveyance. (Wisconsin.)
1529. The same, by redemptioner against purchsaer.
1530. By lessor against lessee for damage and an injunction. (Wisconsin.)
1531. The same, where lessee has covenanted to leave improvements made by him on the premises.
1532. Complaint for waste, general form. (Minnesota.)
1533. Complaint for waste, general form. (North and South Dakota.)
1534. Complaint for waste, general form. (Iowa.)
1535. Complaint for waste, general form. (Nebraska.)

The statutes of most of the code states provide for actions of waste wherein a guardian may be made to account to his ward for waste committed on the ward's estate and wherein a tenant in possession of real estate for life or years may be compelled to pay damages to the remainderman or reversioner as well as to the owner of an intervening estate, if there be one.

In Wisconsin double damages are recoverable in such an action;[1] in California, Idaho, Missouri, Montana, and Utah treble damages;[2] in Minnesota, North Dakota, South Dakota, Oregon and Washington treble damages, and also forfeiture of the estate and eviction where the damage equals the value of the tenants unexpired term or the waste is done in malice;[3] in Iowa and Nebraska treble damages, also for-

[1] Wis. Stats. 1913 sec. 3170-3179.

[2] Cal. C. C. P. 1906 sec. 732; Idaho Rev. Codes 1908 sec. 4530; Mo. R. S. 1909 sec. 7913 (also loss of the thing wasted); Mont. Rev. Codes 1907 sec. 6866; Utah Comp. Laws 1907 sec. 3507.

[3] Minn. Gen. Stats. 1913 sec. 8088; N. Dak. Rev. Codes 1909 sec. 7538 et seq.; S. Dak. C. C. P.

feiture and eviction where the damage equals two-thirds of the value of the defendants interest.[4] In Kansas it is provided that a remainderman or reversioner may maintain an action for waste notwithstanding the existence of an intermediate estate for life or for years;[5] in Oklahoma the action is specifically abolished but the remedy is to be obtained by ordinary action.[6]

1522. By lessor against lessee for damages (Wis. Stats. 1913 secs. 3170–3179).

I. That the plaintiff, before and at the time of the committing of the grievances hereinafter mentioned, was and still is the owner in fee-simple of the following described lands [*description of premises*].

II. That at the time of the committing of said grievances the defendant held and enjoyed the said premises as tenant thereof to the plaintiff, under and by virtue of a demise to the defendant, made by the plaintiff for the term of .... years from ....., 19..

III. That the defendant, with intent to injure the plaintiff in his reversionary interest therein, on the .... day of ....., 19.., and on other days thereafter, and before this action, without authority, cut down and carried away therefrom one thousand beech trees, one thousand chestnut trees, etc., of the value of ..... dollars.

IV. That during the same time he likewise dug up and carried away one thousand cubic yards of soil and herbage, of the value of ..... dollars, and converted all the same to his own use.

V. That during the same time he likewise wrongfully [*or* negligently] set fire to and destroyed a certain building upon the premises, and constituting part of the realty, and wholly destroyed the same, which said building was of the value of ..... dollars. [*State other acts of waste if any, according to the facts*].

VI. That by reason of said acts of waste the value of said premises and of the plaintiff's reversionary interest therein

1908 secs. 693, 694; Oregon Laws 1910 sec. 345; Wash. Rem. and Bal. Codes 1910 sec. 938.

[4] Iowa Code 1897 sec. 4303, 4304; Neb. R. S. 1913 sec. 8244 et seq.

[5] Kans. Gen. Stats. 1909 sec. 4712.

[6] Okla. Comp. Laws 1909 sec. 6221.

has been greatly impaired to the damage of the plaintiff in the sum of ..... dollars for double which sum plaintiff demands judgment against the defendant, with costs.

WHEREFORE, etc.

1523. By remainderman under will against life tenant (Wisconsin).

I. That on the .... day of ....., 19.., one E.... F.... was seized in fee-simple of [*describe the premises*].

II. That in his lifetime the said E.... F.... made and published his last will and testament, whereby he devised the said land to the defendant for life, and afterwards to the plaintiff in fee.

III. That on the .... day of ....., 19.., at ..... the said E.... F.... died.

IV. That said will was afterwards and on the .... day of ....., 19.., duly admitted to probate by the ..... court of ..... county, being the court which had jurisdcition thereof, and on the .... day of ....., 19.., by judgment of said court the said land was duly assigned to the said defendant for life, and the remainder thereof in fee to this plaintiff.

V. That on the .... day of ....., 19.., the defendant entered into possession of said lands under said will, and has ever since been and is now in possession thereof.

VI. [*Continue as in preceding Form, III to VI.*]

WHEREFORE, etc.

1524. By ward against guardian (Wisconsin).[7]

I. That on or about the .... day of ....., 19.., the defendant was by order of the ..... court of ..... county duly appointed the general guardian of the estate of the plaintiff, and thereafter duly qualified and entered upon the discharge of his duties as such guardian, and continued to be such guardian until the .... day of ....., 19.. [*or*, and still is such guardian].

II. That the defendant during his said guardianship was in possession and control of [*describe premises*] which were

[7] If the plaintiff be a minor when the action is brought, a guardian *ad litem* must be appointed, and such appointment must be alleged in the complaint, as in Form 863.

during said time and now are owned in fee simple by plaintiff.

III. That while in possession of said premises as such guardian, and on various days between the .... day of ....., 19.., and the beginning of this action, the said defendant committed acts of waste upon said property, as follows [*here set forth acts of waste as in preceding forms*].

WHEREFORE, etc.

1525. By joint tenant or tenant in common against cotenant (Wisconsin).

I. That the plaintiff and the defendant are seized in fee as tenants in common [*or* joint tenants] of the following described premises [*insert description*] and have been so seized since the .... day of ....., 19..

II. That on or about the .... day of ....., 19.., and at various times thereafter and prior to the commencement of this action the said defendant committed acts of waste upon said premises to the great injury of the plaintiff's estate therein, to-wit, said defendant [*here allege acts of waste as in Form 1522, or according to the facts*].

III. That by reason of the premises, the plaintiff's estate in said lands has been damaged in the sum of ..... dollars.

WHEREFORE, etc.

1526. By heirs against dowress (Wisconsin).

I. That one E.... F.... was in his lifetime seized in fee simple and in possession of lands in ..... county, of which the following described premises are a part.

II. That on the .... day of ....., 19.., being so seized, he died intestate, leaving the defendant C.... D.... his widow.

III. That the defendant C.... D.... thereafter entered on and was possessed as her dower during her life of one-third part of said lands, to-wit, the following described premises: [*description of premises*] which said premises were duly assigned to said defendant as her reasonable dower by order of the ..... court of ..... county entered on the .... day of ....., 19..

IV. That the plaintiffs were left by the said E.... F.... his only children and heirs; and as such were, at the time of

the committing of the grievances hereinafter mentioned and still are, entitled to the reversion in the above described premises subject to said estate in dower.

V. [*Allege acts of waste and damage therefrom.*]

WHEREFORE, etc.

1527. By reversioner against assignee of life estate.

I. That on the .... day of ....., 19.., one C.... D.... was the owner in fee of the premises hereinafter described, and that on said day the said C.... D.... conveyed the same to the plaintiff in fee.

II. That at the time of the said conveyance the plaintiff made and delivered to the said C.... D.... a life lease of said premises for the period of his natural life, and that thereafter and on or about the .... day of ....., 19.., the defendant E.... F.... became possessed of the life estate and interest of the said C.... D.... and thereupon took possession and has ever since remained in possession of said premises.

III. That the said C.... D.... is still alive but aged and inferior, and in the ordinary course of events can not survive many years.

IV. [*Allege acts of waste and consequent damage as in III, IV, V and VI of Form 1522.*]

WHEREFORE, etc. [*Demand for judgment for damages and for injunction against further waste.*]

1528. By purchaser at sheriff's sale, for waste committed before conveyance (Wis. Stats. 1913 sec. 3016).

I. That on the .... day of ....., 19.., the premises hereinafter described were owned in fee simple by one K.... L...., but were subject to the lien of a judgment theretofore recovered by C.... D.... against E.... F.... and docketed in said county on the .... day of ....., 19.., and that on the .... day of ....., 19.., the sheriff of said county, by virtue of an execution issued to him upon said judgment, sold the said premises which are bounded and described as follows [*here describe the premises*].

II. That at such sale the plaintiff became the purchaser, and the sheriff executed and delivered to him a certificate of the sale, and subsequently, and on the .... day of .....,

19.., and before this action executed and delivered to the plaintiff a deed of the premises pursuant to the sale, and the plaintiff paid the purchase-money therefor.

III. That intermediate the sale and the delivery of the deed, the defendant cut and carried from the land one thousand pine-trees [*or otherwise charge the waste committed and resulting damage as in preceding forms*].

WHEREFORE, etc.

1529. The same, by redemptioner against purchaser.

I. [*As in preceding form.*]

II. That at such sale the defendant became the purchaser of said premises and the sheriff executed and delivered to him a certificate of the sale thereof.

III. That afterwards, and before the expiration of [*name period of redemption*] the plaintiff, by virtue of a judgment theretofore recovered by him against said E.... F...., which judgment was a lien on the premises, duly redeemed the same from said sale by paying the necessary amount therefor; and thereafter, and on or about the .... day of ....., 19.., and before this action, the sheriff executed and delivered to the plaintiff a deed of the premises pursuant to the sale and redemption.

IV. [*As III, in the preceding form.*]

WHEREFORE, etc.

1530. By lessor against lessee for damages and an injunction (Wisconsin).

I. That the plaintiff, being then and ever since owner in fee simple of the premises hereinafter mentioned, on the .... day of ....., 19.., by a lease in writing then made between the plaintiff and the defendant, under their hands and seals [*or*, under the hand and seal of the defendant], the plaintiff leased to the defendant [*designate term and premises, e. g. thus*: for ten years from said date, at a yearly rent of $1,000, a certain dwelling-house, with stable and sheds attached, and ten acres of lawn and woodland, orchard and garden, at ..... in the county of ....., the property of the plaintiff].

II. That said lease contained a covenant on the part of the defendant, of which the following is a copy [*copy of the cove-*

nant as to waste or repairs]. [*Or*: II. That the defendant in said lease covenanted that he would, *stating the substance of the covenant.*]

III. That the defendant took possession of the premises under said lease, the same being then in good repair and condition; but that they have since become ruinous and bad, and the lands very much deteriorated by the wilful mismanagement and improper cultivation thereof by the defendant; that he has ploughed up the garden, destroying the shrubbery and flowers therein, and has cut down ten ornamental and shade trees standing near the house, and has cut down ten apple trees in the orchard [*or in like manner state other waste, according to the fact*] and has otherwise suffered and committed great waste on the premises; by reason of which waste the premises are worth ..... dollars less, to be sold, than they were when the defendant took possession thereof; and it would cost ..... dollars to restore them.

IV. That the defendant threatens to cut down other of the ornamental shade, and fruit trees, and to remove the partitions in the first story of the house, and turn it into a workshop [*or other threatened waste*].

WHEREFORE the plaintiff asks judgment: (1) That the defendant may be required to [restore and] repair the premises; (2) that he pay to the plaintiff ..... dollars damages done to and suffered by the premises [the plaintiff hereby waiving all forfeitures and penalties incurred in respect to said waste]; (3) that he be required to keep the same in good repair and condition during the continuance of his interest therein, and to manage and cultivate the farm in a proper and husband-like manner, according to the terms of the lease, and the custom of the country; (4) that he be enjoined from committing any further waste, and particularly from [*stating particular act to be enjoined*].

1531. The same, where lessee has covenanted to leave improvements made by him on the premises.

I. [*Allege the making of the lease and its terms as in last preceding form, or by attaching copy of the lease showing that one of its covenants or conditions expressly provided that all improvements placed in the premises by the lessee should be left there and become the property of the plaintiff.*]

II. That by virtue of said lease said defendant entered into possession of said premises on the .... day of ....., 19.., and since has been and now is in possession thereof.

III. That while so in possession said defendant, as such lessee, has placed certain improvements upon the said premises, to-wit: [*describe same fully*] and that the same have become and are annexed to said premises and constitute a part of the said real estate, and are now by virtue of said agreement, the property of the plaintiff.

IV. That notwithstanding said agreement and in disregard of the rights of the plaintiff in the premises, said defendant threatens and is about to sever and separate said [machinery] [*or otherwise describe the improvement*] from said mill, and to remove and carry the same away therefrom, thereby doing great and irreparable injury and damage to the plaintiff and his said property; and that said defendant with his agents, servants, acting under his direction, are now at work in so separating and removing the said improvements and machinery from said premises; and that it is his intention not to leave such improvement on said premises as required by said agreement, but to remove all of the same and wholly to deprive the plaintiff thereof to his irreparable damage and injury.

V. The plaintiff alleges, upon information and belief, that said defendant is pecuniarily irresponsible and that an action for damages against him would not afford him adequate relief in the premises.

WHEREFORE, the plaintiff demands judgment that the defendant restore to said mill such parts of said improvements as have already been removed therefrom and that said defendant, his agents, servants, and employes be perpetually restrained and enjoined from separating said improvements and machinery so placed therein by them as aforesaid, and from removing the same or any part thereof, and from interfering therewith for any purpose of separation or removal or injury as a part of said premises, and that the plaintiff have such further relief as may be just, with costs.

1532. Complaint for waste, general form (Minnesota).

[*In Minnesota the forms heretofore given in this chapter for use in Wisconsin may be used. The Minnesota statute, how-*

ever, allows judgment for treble damages, also in case of waste by a tenant for forfeiture of a tenant's unexpired term and eviction from the property in case the waste committed equals the value of such unexpired term or was done in malice. Minn. Gen. Stats. 1913 sec. 8088. Where such relief is sought, the following additional allegations should be contained in the complaint after the allegations of waste]:

That the injury thereby done to the said property is the sum of ..... dollars and [more than] equal to the value of the defendant's unexpired term.

That said waste was committed in malice.

WHEREFORE the plaintiff demands judgment: (1) That the estate of the defendant in the said property be forfeited; (2) that he be evicted therefrom; (3) for ..... dollars damages, and for the costs of this action.

1533. Complaint for waste, general form (North and South Dakota).

[*In North and South Dakota treble damages are given for waste, and forfeiture and eviction may be awarded if the waste committed be equal in value to the tenant's estate or if it be done in malice. N. Dak. Rev. Codes 1905 sec. 7539, 7540. S. Dak. C. C. P. 1908 sec. 693-694. The forms heretofore given for use in Wisconsin may be used, adding thereto the additional allegations given in Form 1532 for use in Minnesota.*]

1534. Complaint for waste, general form (Iowa).

[*In Iowa the forms heretofore given in this chapter for use in Wisconsin may generally be used. Judgment should be demanded, however, for treble damages. Iowa Ann. Code 1897 sec. 4303. Judgment of forfeiture and eviction may also be rendered when the damages found are more than two-thirds of the value of the interest of the defendant in the premises. Id. sec. 4304. In case forfeiture and eviction are desired the petition should contain, after the allegations of waste, the following allegation]:*

That the injury thereby done to the said property is the sum of ..... dollars, and more than two-thirds the value of the interest possessed by the defendant in said property.

WHEREFORE the plaintiff demands judgment that the estate of the defendant in said premises be forfeited, and that

he be evicted therefrom, and that the plaintiff recover ..... dollars damages and costs.

1535. Complaint for waste, general form (Nebraska).

[*In Nebraska treble damages are given and judgment of forfeiture and eviction may be had when the waste exceeds two-thirds the value of defendant's interest in the property. Neb. R. S. 1913 sec. 8244, 8245. The forms given for use in Wisconsin may be used with the additional allegation given in Form 1534 for use in Iowa.*]

CHAPTER LXII.

COMPLAINTS FOR TRESSPASS TO REAL PROPERTY.

1536. For single act of trespass.
1537. The same, for cutting and converting timber.
1538. The same, for removing fence.
1539. For various repeated acts of trespass.
1540. For entering plaintiff's house, defacing the same and injuring personal property therein.
1541. For cutting and removing timber. (Wisconsin.)
1542. For treble damages for willful injuries to trees. (Minnesota, Iowa, North Dakota, South Dakota, and Nebraska.)
1543. For treble damages for forcible entry or detainer. (Minnesota, North Dakota and South Dakota.)
1544. For trespass and mesne profits.
1545. Trespass by defendant's animals.
1546. Against railway company for laying and operating tracks on highway in front of plaintiff's premises.

1536. For single act of trespass.

I. That on the .... day of ....., 19.., the plaintiff was the owner and in possession of the following described lands [*insert description*].

II. That on said last named day the defendant unlawfully broke and entered upon said lands and trod down the plaintiff's grass and grain growing thereon and destroyed the same, to the plaintiff's damage.....dollars.

WHEREFORE, etc.

1537. The same, for cutting and converting timber.

I. That on the....day of....., 19.., the plaintiff was the owner and in possession of the following described lands [*insert description*].

II. That on said last named day the defendant unlawfully broke and entered upon said lands and there cut down and carried away the trees and timber of this plaintiff, and converted and disposed of the same to his own use, to plaintiff's damage.....dollars.

WHEREFORE, etc.

1538. The same, for removing fence.

I. That on the....day of....., 19.., the plaintiff was the owner and in possession of the following described lands [*insert description*].

II. That on said last named day the defendant unlawfully broke and entered upon said lands, took down a fence standing upon said land of the plaintiff, and removed the same, and also then and there erected another fence on said land, and also then and there disturbed the plaintiff in the use and occupation of said land, and prevented him from enjoying the same as he otherwise would have done, to his damage.....dollars.

WHEREFORE, etc.

1539. For various repeated acts of trespass.

I. [*As in Form 1536.*]

II. That on said last named day and at various times between said date and the....day of....., 19.., the defendant unlawfully broke and entered upon said lands, and with feet in walking, trod down and ruined the grass and grain of the plaintiff growing thereon, to the plaintiff's damage.....dollars.

[*Or:* with his cattle depastured the grass and grain of the plaintiff then and there growing and of the value of..... dollars.]

[*Or:* with horses and wagons and other vehicles crushed and spoiled the grass and grain then and there growing, and of the value of.....dollars.]

[*Or:* unlawfully cut down and carried away the grass, hay and grain of the plaintiff, then and there growing, of the value of.....dollars, and carried the same away and converted the same to his own use, to the damage of the plaintiff.....dollars.]

WHEREFORE, etc.

1540. For entering plaintiff's house, defacing the same and injuring personal property therein.

I. That on the....day of....., 19.., the plaintiff was the owner and in possession of that certain dwelling-house in the....of....., in said county known as No...., ... street [*or* situated upon Lot.... Block...., *or otherwise de-*

scribe the house] with the furniture and other personal property therein.

II. That on the said....day of....., 19.., the defendant forcibly broke and entered [*or where the entry was without force*, wrongfully entered] the said dwelling house of the plaintiff, and broke and injured the walls and doors thereof [*or other injury, according to the fact*], and took and carried away a table and six chairs, the property of the plaintiff, of the value of.....dollars, and converted and disposed of said goods to his own use [*or:* cut, broke, and injured, *etc., describing the property injured*] to the damage of the plaintiff .....dollars.

WHEREFORE, etc.

1541. For cutting and removing timber (Wis. Stats. 1913 sec. 4269).

I. That on the....day of....., 19.., the plaintiff was and ever since has been the owner and in possession of the following described lands and premises, to-wit [*describe same*].

II. That the defendant, on said day and divers other days between that day and the commencement of this action, did unlawfully and without authority, break and enter upon the premises aforesaid, and cut and remove therefrom....thousand pine trees, of the value of..... dollars, and converted the said trees and the logs cut therefrom to his own use, by manufacturing the same into boards, planks, joists, studding, scantling and shingles, which while in the possession of said defendant were of the value of..... dollars [*state value at highest market at any time since trespass*], to the plaintiff's damage.....dollars.

WHEREFORE, etc.

1542. For treble damages for willful injuries to trees (Minn. Gen. Stats. 1913 sec. 8090; Iowa Ann. Code 1897 sec. 4306; N. Dak. Codes 1905 sec. 6593; S. Dak. C. C. P. 1903 sec. 2323; Neb. R. S. 1913 sec. 8247).

I. [*Allege title and possession as in last preceding form.*]

II. That the defendant, in the month of....., 19.., and at various other times between that time and the commencement of this action, entered upon the said land of the

plaintiff, and did, without the leave of the plaintiff, willfully and wrongfully cut down [*or*, carry off, *or*, cut down and carry off] 300 pine trees and 100 oak trees [*or otherwise describe the wood, underwood, trees, or timber*] of the value of .....dollars; and girdled [*or otherwise injured, describing the injury*] other trees [*designating number and kind*] of the value of.....dollars; whereby the plaintiff lost said trees and timber, and the land belonging to the plaintiff was greatly damaged and lessened in value, to the amount of..... dollars; and thereby the defendant, by the force of section [*here insert chapter and section of the statute applicable*] forfeited and became liable to pay to the plaintiff treble the amount of said damages.

WHEREFORE the plaintiff demands judgment against the defendant for treble the amount of his damages as aforesaid, and for the costs of this action.

1543. For treble damages for forcible entry or detainer (Minn. Gen. Stats. 1913 secs. 8092 and 8093; Bagley v. Sternbery, 34 Minn. 470; 26 N. W. 602; N. Dak. Codes 1905 sec. 6592; S. Dak. C. C. P. 1908 sec. 2322; Olsen v. Huntamer, 6 S. Dak. 364; 61 N. W. 479).

I. That at the time hereinafter mentioned, the plaintiff was rightfully and peaceably in possession of a certain farm and dwelling-house, barns, and sheds thereon, described as follows [*insert description*].

II. That on the....day of....., 19.., the defendant forcibly entered thereon, and in a forcible manner and without lawful authority disseized the plaintiff and ejected and put him out of said lands and tenements, and by force and with a strong hand kept him out therefrom, to his damage .....dollars; whereby the defendant, by force of section [*insert chapter and section of the statute applicable*] forfeited and became liable to pay treble the amount of said damages.

WHEREFORE, etc. [*demand for judgment as in the last preceding form*].

1544. For trespass and mesne profits.

I. That at the times hereinafter mentioned plaintiff was and now is the owner in fee of the following described prem-

ises [*describe same*] and entitled to the immediate possession thereof.

II. That on the....day of....., 19.., defendant wrongfully entered in said premises and took possession thereof and wrongfully retained possession thereof until .....and during that time cultivated the same and enjoyed the rents and profits thereof.

III. That the plaintiff was thereby deprived of the use of said premises by the defendant for the period of..... and that the value of the use and occupation thereof during such period was.....dollars.

IV. That plaintiff is now in possession of said premises.

WHEREFORE, etc.

1545. Trespass by defendant's animals.

I. [*As in Form 1536.*]

II. That on said day the defendant wrongfully and negligently permitted his cattle belonging to him to rove and escape from his lands; that said cattle did wrongfully and forcibly break and enter into and upon plaintiff's said close.

III. [*Allege damage as in previous forms.*]

WHEREFORE, etc.

1546. Against railway company for laying and operating tracks on highway in front of plaintiff's premises.

I. [*Allege ownership by plaintiff of premises abutting the highway and that such ownership extended to the center of the highway subject only to the public use thereof as and for a highway.*]

II. [*Allege the corporate character of the defendant and its business as a common carrier.*]

III. That on or about the....day of....., 19.., and on divers other days and times between that day and the commencement of this action, and while the said plaintiff was so possessed of said premises, the said defendant, its servants and agents, without right or authority, wrongfully and unlawfully entered upon that said portion of plaintiff's said premises which is used as such public highway, lying between and bounded by the center line of said highway and the front line of the building of said plaintiff, erected on said premises

above described, and committed acts of trespass and injuries to said premises by running thereon daily, during said period, cars propelled by steam [*or*, electricity] to the injury of said premises, in the depreciation of the value of said building and real estate, and to the injury of the business carried on by said plaintiff in his said building during all of said times, in all amounting to the sum of.....dollars.

IV. That said acts of trespass have been committed without the consent of the said plaintiff, and without authority of law, and that no compensation, by way of award or otherwise, has been made to the plaintiff by the defendant for the said damage to said property.

WHEREFORE, etc.

CHAPTER LXIII.

COMPLAINTS IN EJECTMENT.

1547. Complaint in ejectment, general form, claiming mesne profits.
1548. Complaint in ejectment, general form, nominal damages only. (Wisconsin.)
1549. The same, claiming damage for mesne profits and for waste. (Wisconsin.)
1550. The same, for dower estate. (Wisconsin.)
1551. Complaint in ejectment, general form, no damages. (Minnesota.)
1552. The same, with claim for mesne profits and waste. (Minnesota.)
1553. The same, where both parties claim from common source. (Wisconsin and Minnesota.)
1554. The same, alleging title by devise. (Wisconsin and Minnesota.)
1555. The same, alleging title by descent. (Wisconsin and Minnesota.)
1556. The same, by administrator. (Wisconsin.)
1557. Petition in ejectment, general form, nominal damages. (Iowa.)
1558. The same in action against cotenant. (Iowa.)
1559. The same, with claim for mesne profits. (Iowa.)
1560. Complaint in ejectment. (North and South Dakota.)
1561. Petition in ejectment without damages. (Nebraska.)
1562. The same, with claim for mesne profits. (Nebraska.)
1563. The same, by tenant in common against cotenant. (Nebraska.)
1564. By homestead entry man.

The term ejectment is used in the title of this chapter simply for convenience. The common law action of ejectment was abolished by the code, and it is not used in the statutes of the code states generally, although in Wisconsin it is again used to designate the action to recover the possession of real estate. In the other states covered by this work it is included within the general class of actions denominated generally actions concerning or for the recovery of real property, except in Texas, where it is denominated an action of trespass to try title. Wis. Stats. 1913, sec. 3073; Ariz. R. S. 1913 sec. 1627; Ark. Dig. of Stats. 1904 sec. 2734; Cal. C. C. P. 1906 secs. 379, 380, 738 *et seq*; Colo. Code Ann. 1911 sec. 4084; Idaho Rev. Codes 1908 secs. 4538 *et seq*. Iowa Ann. Code 1897 sec. 4182; Kans. Gen. Stats. 1909

secs. 5641, 6214; Mont. Rev. Codes 1907 sec. 6432; Minn. Gen. Stats. 1913 sec. 8060 *et seq.* Mo. R. S. 1909 sec. 2382 *et seq.* Neb. R. S. 1913 sec. 8239; N. Dak. Rev. Codes 1905 sec. 5904; S. Dak. C. C. P. 1908 secs. 675, *et seq.* Okla. Comp. Laws 1909 sec. 6121 *et seq.* Oregon Laws 1910 sec. 325 *et seq.* Tex. Civ. Stats. Ann. 1913 art. 7731; Utah Comp. Laws 1907 sec. 2989; Wash. Rem. and Bal. Code 1910 secs. 785 *et seq.* Wyo. Comp. Stats. 1910 sec. 4966.

1547. Complaint in ejectment, general form, claiming mesne profits.

I. That on the....day of....., 19.., plaintiff was seized in fee and rightfully possessed of that certain parcel of land [*describe same*].

II. That while plaintiff was so seized the defendant on said day, without right, entered into possession of the said premises and ousted and ejected the plaintiff therefrom, and now unlawfully withholds possession thereof from the plaintiff to his damage in the sum of.....dollars.

III. That the value of the rents, issues and profits of said premises from the said....day of....., 19.., until the commencement of this action is.....dollars.

WHEREFORE plaintiff demands judgment against defendant for the recovery of said premises and for the sum of .....dollars damages for the withholding of the possession thereof, also for the sum of.....dollars, the value of the rents, issues and profits thereof, together with the costs of this action.

1548. Complaint in ejectment, general form, nominal damages only (Wis. Stats. 1913 sec. 3077).

I. That the plaintiff has an estate in fee simple [*or*, for the life of him the plaintiff, *or*, for years from....., 19.., *specifying the life or the length of the term*] in the following described real estate [*here insert an accurate description of the premises claimed, designating the number of the lot or township, if any, in which they are situated; if none, stating the names of the last occupants of lands adjoining the same, if any, or by metes and bounds, or in some other way so that from the description given possession of the premises claimed may be delivered.*]

II. That the plaintiff is entitled to the possession of said premises, and that the defendant unlawfully withholds the possession thereof from him, to his damage in the sum of six cents.

WHEREFORE the plaintiff demands judgment against the defendant for the possession of said premises and for six cents damages and for the costs and disbursements of this action.

1549. The same, claiming damage for mesne profits and for waste (Wis. Stats. 1913 sec. 3082).

I. [*As in last preceding form.*]

II. That the plaintiff is entitled to the possession of said premises, and that the defendant unlawfully withholds possession thereof from the plaintiff, and has so unlawfully withheld possession thereof since the....day of....., 19.., to the plaintiff's damage.....dollars.

III. That, while so unlawfully in possession, said defendant has committed waste thereon, by removing buildings and parts of buildings therefrom, by cutting down, and disposing of much valuable timber and trees thereon, by quarrying and carrying away therefrom large quantities of valuable building stone [*or otherwise state the waste complained of*] and by the said acts of waste said defendant has permanently injured and impaired the value of said premises, and the plaintiff's estate therein, to the plaintiff's damage in the sum of.....dollars.

WHEREFORE the plaintiff demands judgment against the defendant: (1) For the possession of the said premises (2) for .....dollars, the plaintiff's damages for the withholding thereof, and for the waste done and permitted thereon as aforesaid, and for the costs and disbursements of this action.

1550. The same, for dower estate (Wis. Stats. 1913 sec. 3077).

I. That the plaintiff and one E.... F.... were lawfully married on the....day of....., 19.., and that the said E.... F.... died on the....day of....., 19.., and that the plaintiff is now the widow of the said E.... F.... deceased.

II. That at the time of his death, the said E.... F.... was seized in fee simple and in possession of the following described premises, to-wit [*here describe premises as in preceding forms*].

III. That the plaintiff, as widow of said E.... F.... owns an estate for her life in one-third part of the above described premises, as her reasonable dower, and is entitled to the possession thereof.

IV. That the above named defendants deny the plaintiff's said dower right, and unlawfully withhold the possession of her said one-third part of said premises, from the plaintiff, to her damage.....dollars.

[*If recovery for use and occupation, or waste, is sought, add allegations for that purpose, as in last preceding form.*]

WHEREFORE [*add demand for judgment as in preceding forms.*]

1551. Complaint in ejectment, general form, no damages (Minnesota).[1]

I. That the plaintiff is the owner in fee [*or* is the owner of an estate for life, *or*, for years, *as the fact is*] and entitled to the immediate possession of [*describing premises*] in the county aforesaid.

II. That defendant is now in possession thereof and unlawfully withholds the same from plaintiff.

WHEREFORE the plaintiff demands judgment for the recovery of the possession of said premises, and for the costs and disbursements of this action.

1552. The same, with claim for mesne profits and waste (Minn. Gen. Stats. 1913 sec. 8068).

I. That on the....day of....., 19.., the plaintiff was and still is the owner in fee [*or* for life, *or*, for years] of the following described premises [*insert description*].

II. That on the day aforesaid the defendant wrongfully entered into said premises and ousted the plaintiff, and still unlawfully withholds the possession thereof from him.

[1] This short form of complaint is substantially held sufficient in Pinney v. Fridley, 9 Minn. 34, and Merrill v. Dearing, 22 Minn. 376.

III. That the value of the use and occupation of said premises, from the time the defendant so took possession up to the time of the commencement of this action, is..... dollars.

IV. [*If recovery for damage to the freehold is sought insert the proper allegation, as in the second form in this chapter.*][2]

WHEREFORE the plaintiff demands judgment: (1) For the recovery of the possession of said premises; (2) for the sum of .....dollars, the value of the use and occupation of said premises; (3) for the further sum of.....dollars as damages for injuries to said premises; (4) for the costs and disbursements of this action.

1553. The same, where both parties claim title from common source (Wisconsin and Minnesota).[3]

I. That on the....day of....., 19.., one E....F.... was the owner in fee and in possession of the following described premises [*insert description*] and that on said day the said E.... F.... duly conveyed the same in fee to the plaintiff, who is still the owner in fee and entitled to the possession thereof.

II. [*Allege withholding of possession, etc., as in preceding forms.*]

1554. The same, alleging title by devise (Wisconsin and Minnesota).

I. That on the....day of....., 19.., one E.... F.... was lawfully seized as owner in fee simple, and was in possession of the following described premises [*insert description.*]

II. That on said day the said E.... F.... died leaving a last will duly executed, wherein he devised to plaintiff the said premises.

[2] A claim for permanent injuries to the estate while in defendant's possession should be made in the ejectment action, as it is part of the same cause of action. Pierro v. Ry. Co., 37 Minn. 314; 34 N. W. 38; 39 Minn. 451; 40 N. W. 520.

[3] This method of pleading is useful because if the complaint be verified the defendant must admit common source of title, and thus obviate necessity of proving previous title.

III. That on the....day of....., 19.., said will was duly proved and admitted to probate in the.....court in and for the county of.....state of.....

IV. That on the....day of....., 19.., said premises were duly assigned to plaintiff in fee by the terms of a final judgment of distribution then and there duly made by said court, and that the plaintiff is still the owner in fee and entitled to the possession of said premises.

V. [*Continue as in the appropriate preceding form.*]

1555. The same, alleging title by descent (Wisconsin and Minnesota).

I. [*As in last preceding form.*]

II. That on said day the said E.... F.... died intestate, leaving these plaintiffs his only children and heirs at law.

III. That thereafter the estate of the said E.... F.... was duly administered upon in the.....court in and for the county of.....state of....., and that on the....day of ....., 19.., by a judgment or order of final distribution, which was duly made by said court, said premises were assigned in fee to plaintiffs, who are still the owners thereof in fee simple, and entitled to the possession thereof.

IV. [*Continue as in appropriate preceding form.*]

1556. The same, by administrator (Wis. Stats. 1913 sec. 3083).

I. [*As in last two preceding forms.*]

II. That on said day the said E.... F.... died intestate, leaving G.... H.... and J.... K.... his only children and heirs at law, who then became and now are lawfully seized as owners in fee simple of the said real estate.

III. That on the....day of....., 19.., this plaintiff, upon proceedings duly had in and before the.....court of .....county was by said court duly appointed administrator of the estate of said E.... F...., deceased, and thereafter duly qualified and entered upon the duties of his said trust and is now such administrator, and as such entitled to the immediate possession of said real estate.

IV. That defendant is in possession of said premises and unlawfully withholds the same from the plaintiff as such administrator, to his damage.....dollars. [*Add claim for*

mesne profits, if sought to be recovered, and demand for judgment as in preceding forms.]

1557. Petition in ejectment, general form, nominal damages (Iowa Ann. Code 1897 sec. 4187).

I. That the plaintiff is entitled to the possession of the following described premises [*insert accurate description thereof*].

II. That the plaintiff is the owner of said premises in fee simple [*or*, is the owner of an estate for the life of him the said plaintiff in said premises, *or otherwise state the nature and extent of plaintiff's interest*].

III. That the defendant unlawfully keeps the plaintiff out of possession of said premises, to the plaintiff's damage in the sum of six cents.

IV. That a true and correct abstract of the title of said premises is attached to and made part of this petition, and marked Exhibit A. [*Iowa Ann. Code 1897 sec 4188.*]

WHEREFORE plaintiff demands judgment for the immediate possession of said premises, together with six cents damages and costs.

[*Attach abstract of title.*]

1558. The same in action against cotenant (Iowa Ann. Code 1897 sec. 4185).

I and II. [*As in preceding form, specifying however the particular share of the estate to which plaintiff is entitled and the nature of his tenancy, whether joint or in common.*]

III. That prior to the commencement of this action the plaintiff demanded possession of said premises from the said defendant, but that the defendant denied the plaintiff's right to the same, or any part thereof, and that the defendant unlawfully keeps the plaintiff out of possession of said premises, to the plaintiff's damage in the sum of six cents.

IV. [*Continue as in last preceding form.*]

1559. The same, with claim for mesne profits (Iowa Ann. Code 1897 sec. 4198).

I and II. [*As in last two forms.*]

III. That the defendant unlawfully keeps the plaintiff out of possession of said premises, and has unlawfully kept

the plaintiff from such use and possession since the....day of ....., 19.., up to the time of the commencement of this action, to the plaintiff's damage in the sum of.....dollars.

IV. [*Continue as in last two forms.*]

1560. Complaint in ejectment (North Dakota and South Dakota).

[*In these states the forms given previously in this chapter for use in Wisconsin and Minnesota will be found sufficient. N. Dak. Rev. Codes 1905 Chap. 30; S. Dak. C. C. P. Chap. 29; Brady v. Krueger, 8 S. Dak. 464; 66 N. W. 1083; Lewis v. Ry. Co., 5 S. Dak. 148; 58 N. W. 580; Hegar v. De Groat, 3 N. Dak. 354; 56 N. W. 150.*]

1561. Petition in ejectment without damages (Neb. R. S. 1913, sec. 8239).

I. That said plaintiff has a legal estate in and is entitled to the possession of the following described premises, to-wit [*describe premises with certainty*], situate in.....county, and said defendant, ever since the....day of....., 19.., has unlawfully kept and still keeps the plaintiff out of the possession thereof.

WHEREFORE the plaintiff demands judgment for the delivery of the possession of said premises, and for the costs of this suit.

1562. The same, with claim for mesne profits (Nebraska).

I. [*As in last preceding form.*]

II. That the defendant, while unlawfully in possession of said premises, has received the rents and profits thereof from the....day of....., 19.., to the commencement of this action, amounting to the sum of.....dollars, and has applied the same to his own use, to the plaintiff's damage in the sum of.....dollars.

WHEREFORE the plaintiff demands judgment for the delivery of the possession of said premises and also for said sum of.....dollars for said rents and profits, and for costs of suit.

1563. The same, by tenant in common against cotenant (Nebraska).

I. That said plaintiff has a legal estate in and is entitled to the possession, as a tenant in common with the defendant, of the following described premises, to-wit [*describe premises*], situate in.....county.

II. That the defendant denies that the plaintiff has any estate in said premises as tenant in common or otherwise, and claims to own the entire estate, and that said defendant ever since the....day of....., 19.., has unlawfully kept and still keeps the plaintiff out of the possession thereof.

[*Add allegation of receipt of rents and profits and demand of judgment as in preceding forms.*]

1564. By homestead entry man (precedent in Thompson v. Basler, 148 Cal. 646, 84 Pac. 161).

I. That on the....day of....., 19.., the plaintiff was lawfully in possession of the following described real estate [*describe same*] and that the plaintiff had title to said real estate as a homestead entry man under the laws of the United States.

II. That the plaintiff ever since said....day of....., 19.., has been and now is the owner of said real estate possessing title thereto as homestead entryman, and has been and now is entitled to the possession thereof.

III. That the plaintiff continued in possession of said presmises from the....day of....., aforesaid until on or about the....day of....., 19.., when the defendant wrongfully and unlawfully entered upon and took possession of the same [*or* of a portion thereof described as follows] and ousted the plaintiff therefrom and now unlawfully withholds possession thereof from the plaintiff to his damage..... dollars.

WHEREFORE, etc.

CHAPTER LXIV.

COMPLAINTS FOR FORECLOSURE.

1565. Outline of complaint to foreclose a mortgage.
1566. Complaint for foreclosure of mortgage, all due, general form. (Wisconsin.)
1567. The same, amount not all due. (Wisconsin.)
1568. The same, where mortgage contained covenant to insure, and option clause.
1569. Assignee against mortgagor, mortgagee who guaranteed payment, and subsequent purchaser, who assumed the mortgage.
1570. Allegation of inadequacy of security where a receiver is desired.
1571. By mortgagee in possession against parties entitled to redeem, seeking accounting.
1572. To have deed absolute declared a mortgage, and foreclosed.
1573. For foreclosure of mortgage, general form. (Minnesota.)
1574. For foreclosure of mortgage, general form. (North and South Dakota.)
1575. For foreclosure, general form. (Nebraska.)
1576. The same, where there are junior incumbrancers, and agreement to pay taxes which has been breached. (Nebraska.)
1577. Petition in mortgage foreclosure, general form. (Iowa.)
1578. The same, another form. (Iowa.)
1579. The same, amount not all due. (Iowa.)
1580. For foreclosure of title bond. (Iowa.)
1581. For foreclosure of chatte mortgage, general form.
1582. The same, where there are subsequent incumbrances.
1583. For foreclosure of a bill of sale of chattels given as a chattel mortgage.
1584. For foreclosure of pledge. (Iowa.)
1585. Complaint for strict foreclosure of land contract.
1586. Complaint to enforce forfeiture of land contract. (Minnesota.)
1587. To revive mortgage and for subrogation in favor of one who has paid it, expecting to receive a new one.
1588. Outline of complaint by trustee to foreclose mortgage or deed of trust from corporation for the benefit of bondholders.

The pleading and practice in foreclosure actions differs in details in the various states, while preserving similarity in the fundamental requirements. No attempt is made to insert here a separate complaint for every state covered

by this work. It is not supposed that a foreclosure action will be commenced in any state without a careful examination of the statutes of that state bearing on that subject. These statutes are cited in the note.[1]

[1] Wis. Stats. 1913 sec. 3154 et seq. A claim for deficiency may be united with the claim to foreclose; if the forclosure be only for an installment of interest the action is dismissed if the amount due be brought into court before judgment and stayed if it be brought in after judgment. Redemption may be made at any time before sale which can not take place until a year after the judgment and if there be a deficiency, judgment is then rendered therefor against the parties personally liable.

Ariz. R. S. 1913 sec. 4113 et seq. Plaintiff may elect to prosecute action on the debt, or to foreclose; either action resulting in discontinuance of the other, with costs. Judgment is rendered for the amount due, and execution sale takes place without interlocutory judgment, subject to redemption as on ordinary execution sale, viz., by the judgment debtor, his heirs, representatives, or grantees within six months after sale (sec. 1375), and creditors within five days successively, according to priority, after expiration of senior redemption rights (sec. 1376, 1377). Junior lienors are entitled to assignment of the senior mortgagee's interest. If the proceeds of sale are insufficient to satisfy the judgment, execution issues for deficiency.

Ark. Dig. of Stats. 1904 sec. 6233-6235, 6237. Final judgment is given in the first instance, for a sale and recovery of the debt; execution issues for any deficiency. The mortgagor, his heirs or representatives, may redeem within one year from the date of sale; but the right of redemption may be waived in the mortgage. (sec. 5420).

Cal. C. C. P. 1906 sec. 726 et seq. There can be but one action for the recovery of the debt and enforcement of the mortgage. Judgment directs sale by a commissioner as upon execution, and if there be a deficiency, judgment is docketed against the defendants personally liable. Redemption may be had as upon execution sale, at any time within twelve months, (sec. 702, 703).

Colo. Code Ann. 1911 sec. 271-273. Judgment directs sale of so much as may be necessary to satisfy debt; if not all due, then so much as may be due, and afterwards as often as more becomes due. If property is insufficient, judgment is docketed against defendant personally liable.

Idaho Rev. Codes 1908 sec. 4520-4523. As in Colorado.

Iowa Ann. Code 1897 sec. 4287 et seq. Foreclosure as in Arizona. Redemption by debtor as on executions sale, viz., exclusive right within six months, and concurrent with other creditors for six months thereafter, (sec. 4045-4053).

Kans. Gen. Stats. 1909 sec. 5992. Judgment rendered for amount due plaintiff and other parties to action having liens, and for sale of property and application of proceeds by order of court. Redemption as on execution; by debtor in possession within eighteen months after sale, first twelve months exclusively and thereafter concurrently with creditors; if not in possession, redemption by owner within six months, and by junior lienors within three months thereafter (sec. 6071-6072).

Minn. Gen. Stats. 1913 sec. 8152 et seq. Procedure same as in other civil actions. Judgment for amount due enforced by sale of real estate as on execution; and execution for deficiency. Redemption by mortgagor, or those claiming under him,

1565. Outline of complaint to foreclose a mortgage.

I. [*Allege the execution of the note or other evidence of indebtedness, as in a complaint upon such instrument alone, either pleading legal effect or annexing a copy. See chapter XX.*]

II. *Allege the execution of the mortgage as security for the note and the recording thereof, pleading the legal effect of its provisions or annexing a copy as an exhibit.*]

III. [*Allege the failure to pay principal or interest or both; also any breaches in the covenants or agreements of the note or mortgage.*]

IV. [*Allege the amounts expended by the plaintiff to pay taxes, insurance, etc., to protect his mortgage interest, and which defendant should have paid under the agreements of the mortgage.*]

V. [*Prayer for judgment of foreclosure and sale of the premises and the barring of subsequent lien holders, according to the provisions of the particular state.*]

within one year after confirmation of sale; by creditors (sec. 8147), successively within five days after expiration of right of seniors.

Mo. R. S. 1909 sec. 2828 et seq. Procedure same as in civil suits. Redemption may be had at any time before sale; on foreclosure of a deed of trust, the cestui qui trust or his assignees may redeem at any time within one year from the date of sale. Execution issued for any deficiency.

Mont. Rev. Codes 1907 sec. 6861 et seq. As in Colorado. Judgment debtor, or successor in interest, or creditor having lien, may redeem within one year after sale.

Neb. R. S. 1913 sec. 8254 et seq. On petition filed, court may decree sale of the mortgaged premises; on coming in of the report of sale court may direct payment of any deficiency by the mortgagor and may issue execution therefor. Other lien debtors may be brought in to satisfy deficiency. Defendant may stay the sale proceedings by payment of amount due, but judgment of foreclosure and sale is entered and remains in force against subsequent default. The owner may redeem at any time before confirmation of the sale, (sec. 8076).

N. Dak. Rev. Codes 1905 sec. 7476 et seq. Foreclosure action bars action for debt; and vice versa, unless execution in the action at law is returned unsatisfied. Other lien debtors may be brought in to satisfy deficiency. There may be successive sales on orders founded upon the first judgment; or the first judgment may direct sale of the whole premises, if most beneficial to parties, and the proceeds applied, with rebate of interest for period before maturity of installments. The mortgagor, successors in interest, and lien creditors may redeem at any time within one year after date of sale.

S. Dak. C. C. P. 1908 sec. 655 et seq. As in North Dakota.

Okla. Comp. Laws 1909 sec. 5921. Personal judgment rendered for amount due and for sale of the property charged and application of the proceeds.

Oregon Laws 1910 sec. 422 et

1566. Complaint for foreclosure of mortgage, all due, general form (Wisconsin).

I. That the defendant [*maker of note*] on the .... day of ....., 19.., for value received, executed and delivered to the plaintiff [*or*, to one X.... Y....] his certain promissory note in writing dated on that day, and thereby promised to pay to the said [*promisee*] or order the sum of ..... dollars with interest thereon at the rate of .... per cent per annum, payable annually [*or otherwise according to conditions of note*] [*or set forth copy of note*].

II. That in order to secure the payment of the said indebtedness the defendants [*makers of mortgage*] did at the same time duly execute, acknowledge and deliver to the said [*promisee*] a mortgage bearing even date with said note and conditioned for the payment of the said indebtedness represented by said note, whereby they mortgaged, granted, conveyed, bargained and sold to the said [*promisee*] those certain lands, with the appurtenances, situated in the county of ..... state of Wisconsin, and described

seq. Decree in suit for foreclosure and sale, and for recovery of the amount of the debt. Execution against the property charged, and execution over for deficiency; but on a purchase-money mortgage, no deficiency is collectible. Foreclosure bars action for debt; and vice versa, unless execution in action at law is returned unsatisfied. If not all due, sale of sufficient to satisfy amount due, and judgment stands against future defaults. Payment after decree and before sale stays proceedings until subsequent default. Redemption, as on execution sale, by judgment debtor and lien creditors within one year after confirmation of sale. (sec. 246-248).

Tex. Civ. Stats. Ann. 1913 sec. 2000. Judgment that plaintiff recover debt, and order of sale of property charged, as on execution; execution for deficiency.

Utah Comp. Laws 1907 sec. 3498 et seq. There can be but one action; judgment for amount due, and sale of property; execution for deficiency. If debt not all due, successive sales may be ordered; but the whole may be sold in the first instance, with rebate of interest for amounts not due. Redemption as on execution, within six months after sale, (sec. 3262).

Wash. Rem. and Bal. Code 1910 sec. 1116 et seq. Remedy is confined to mortgaged property, except when otherwise agreed in the mortgage or other instrument of indebtedness given in the latter case, judgment over for deficiency. Decree enforced by execution. Concurrent actions not maintainable. Redemption as on execution, within one year after date of sale, (sec. 594-602).

Wyo. Comp. Stats. 1910 sec. 3671 et seq. No action is brought; the sale takes place by virtue of power of sale, after prescribed notice. Redemption as on execution sale, by defendant within six months from the sale, and by lien creditors successively, within sixty days after expiration of prior redemption rights. (sec. 4735-4739).

in said mortgage as follows [*insert full description*] upon the express condition that if the said [*mortgagors*] their heirs, executors, administrators or assigns, should well and truly pay or cause to be paid to the said mortgagee, his heirs, executors or assigns, the said sum of ..... dollars and interest, according to the terms of said note, then the said note and said mortgage should cease and be null and void.

III. That among other provisions it was provided in and by said mortgage, that the said [*mortgagors*] should pay annually to the proper officers all taxes which should be assessed on said mortgaged premises; and that in case of the foreclosure of said mortgage the said mortgagor would pay to the said mortgagee or his assigns, in addition to the taxable costs in the foreclosure suit, reasonable and customary solicitor's fees [*or*, the sum of ..... dollars for solicitor's fees].

IV. That said mortgage was duly attested by two subscribing witnesses, and was duly acknowledged, so as to entitle it to be recorded, and was received for record in the office of the register of deeds for the county of ..... in Wisconsin, on the .... day of ....., 19.., at .... o'clock in the .... noon, and was recorded in volume .... of mortgages, on page .....

V. That the plaintiff is still the lawful owner and holder of said note and mortgage [*or, if plaintiff is an assignee of the original payee*]: That on the .... day of ....., 19.., the said note and mortgage was duly sold and assigned to the plaintiff for value, and that he is now the lawful owner and holder thereof.

VI. That the said defendants [*mortgagors*] have failed to comply with the terms of the said note and the conditions of the said mortgage by failing and neglecting to pay the sum of ..... dollars, which became due and payable as principal on the .... day of ....., 19.., and by failing and neglecting to pay the sum of ..... dollars interest which became due and payable on the .... day of ....., 19.., and by failing and neglecting to pay the taxes and assessments which have been assessed, taxed and levied on and against said mortgaged premises for the year 19.., by the proper authorities.

VII. That there is now justly due to the plaintiff upon said note and mortgage the sum of ..... dollars as principal, with interest thereon from the .... day of ....., 19.., at .... per cent per annum, and the further sum of [*here state all other sums due*].

VIII. That the defendants [*insert names of all the defendants except those personally liable for the debt*] have or claim to have some interest in or lien upon the said mortgaged premises, or some part thereof, which interest or lien, if any, has accrued subsequently to the lien of said mortgage, and that no proceedings have been had, at law or otherwise, for the recovery of the sum secured by said note and mortgage, or any part thereof, and that no part thereof has been paid or collected except the interest up to the .... day of ....., 19...

IX. [*If the premises are inadequate security and an injunction be desired:*] That the said premises are an inadequate security for the said sum secured by said note and mortgage, with interest and costs; that the value of said premises consists in great part of buildings, fences, and standing and growing timber, and that said plaintiff fears that the defendants [*mortgagors and occupants*] will, unless enjoined by this court, commit waste upon said premises by removing, injuring or destroying said buildings or fences, and cutting down and hauling away said timber, or by other acts of waste; and that unless so enjoined they will, by such and other acts of waste thereon, impair the value of said mortgaged premises, and thereby so diminish and impair said plaintiff's security as to prevent him from realizing the amount of said note and mortgage from the same. [*Insert allegation of insolvency of the mortgagors, if such be the fact.*]

WHEREFORE the plaintiff demands judgment of foreclosure and sale of the said mortgaged premises as provided by law; that the amounts due the plaintiff for principal, interest, costs, disbursements and solicitor's fees be adjudged and determined as well as the amount of unpaid tax liens upon said premises; that said defendants and all persons claiming under them, or any or either of them, subsequent to the commencement of this action may be barred and foreclosed of all right, claim, lien and equity of redemption in said premises, except the right to redeem the same before

sale, as provided by law; that the said premises, or such part thereof as may be sufficient to pay the amounts due upon said note and mortgage may be adjudged to be sold, unless redeemed within the time and in the manner provided by law, and that the said tax liens be paid, and the plaintiff paid the amount due on said notes and mortgage, with interest to the time of such payment, and the costs and disbursements of this action, and the sum of ..... dollars, solicitor's fees, with interest on the same, as allowed by law, from date of judgment, out of the proceeds of such sale, so far as the moneys arising from such sale and property applicable thereto will pay the same, and that the plaintiff may have judgment and execution for any deficiency remaining unpaid after applying the proceeds of said sale thereon as prescribed by law against the said [*defendants personally liable*] who are personally liable for the payment of the debt secured by said mortgage; and that the defendants [*mortgagors and occupants*] be enjoined from committing waste on said premises, or doing any other act that may impair the value of the same at any time between the date of such judgment and the date of the sale of said premises; and that the plaintiff have such other or further judgment, order or relief as may be just and equitable.

1567. The same, amount not all due (Wisconsin).

[*Follow preceding form, but add to allegation VII*]*:* and that the further sum of ..... dollars principal and ..... dollars interest will become due upon said note and mortgage on the .... day of ....., 19...

[*Prayer for judgment as follows:*]

WHEREFORE the plaintiff demands judgment of foreclosure and sale of said mortgaged premises as provided by law; that the amounts actually due the plaintiff for principal, interest, costs, disbursements and solicitor's fees, as well as the amounts of unpaid tax liens upon said premises and the amounts to grow due hereafter upon said note and mortgage be adjudged and determined, that said defendants and all persons claiming under them or either of them subsequent to the commencement of this action may be barred and foreclosed, etc. [*proceed as in last preceding form*].

1568. The same, where mortgage contained covenant to insure, and option clause.

I and II. [*As in Form 1566.*]

III. That it was further provided in and by said mortgage that the said defendant [*mortgagor*] his heirs, executors, administrators or assigns, should pay annually to the proper officers all taxes which should be assessed on said mortgaged premises, on or before the first day of May next after such taxes shall have become due and payable; and should keep the buildings on said mortgaged premises insured against loss or damage by fire in some solvent insurance company so long as the money secured by said mortgage should remain unpaid, to the amount of at least ..... dollars, and should assign or keep assigned to said mortgagee or his assigns the policy or policies of such insurance, and in case of failure so to do, then that it should be lawful for said mortgagee or his assigns to effect such insurance, and that the premium or premiums, and other legal expenses, fees, costs, and charges paid for effecting the same, together with interest thereon at the rate of .... per cent per annum, should be a lien on said premises, and should be added to the amount of said note and mortgage; and that it was further covenanted and agreed in said mortgage that in case of nonpayment of any sum of money [either of principal, interest, insurance money or taxes] at the time or times when the same should become due according to the conditions of said note or mortgage, or any part thereof, or in case of any neglect or refusal to keep said buildings insured, or the policy or policies assigned as aforesaid, then in such case the whole amount of said principal sum should, at the option of said mortgagee or his assigns, be deemed to have become due, and the same, with interest thereon at the rate aforesaid, should thereupon be collectible in a suit at law or by foreclosure of said mortgage, in the same manner as if the whole of said principal sum had been made payable at the time when any such failure in any payment should occur as aforesaid; and that in case of the foreclosure of said mortgage the said mortgagors would pay to said mortgagee or his assigns, in addition to the taxable costs in the foreclosure suit, reasonable and customary solicitor's fees.

IV. and V. [*As in Form 1566.*]

VI. That the said defendant [*mortgagor*] has failed to comply with the terms of the said note and the conditions of the said mortgage by failing and neglecting to pay the sum of ..... dollars which became due and payable on the .... day of ....., 19.., and by failing and neglecting to pay the taxes and assessments which have been assessed and levied on and against said mortgaged premises for the year 19.., by the proper authorities, and by failing and neglecting to keep the buildings on said mortgaged premises insured in a solvent insurance company in the sum of ..... dollars, and to keep assigned to said plaintiff the policy or policies of such insurance as covenanted in said mortgage; and that by reason of the aforesaid defaults of the said mortgagors the plaintiff was obliged to pay the sum of ..... dollars for insurance upon said buildings on the .... day of ....., 19.., and that said plaintiff did, on the .... day of ....., 19.., elect that the whole amount of the principal sum aforesaid should become due, and on said last named day duly notified said defendants [*mortgagors*] of such election and demanded the immediate payment of the full amount of said principal sum and of the interest due thereon, of which said notice a copy is hereto attached and marked Exhibit A, and made a part of this complaint.

[*Prayer for judgment as in Form 1566, inserting claim that amounts paid for insurance be ascertained and added to mortgage.*]

1569. Assignee against mortgagor, mortgagee who guaranteed payment, and subsequent purchaser, who assumed the mortgage.

[*Insert in either of preceding forms, at the proper place, the following allegations:*]

That on the .... day of ....., 19.., the defendant [*mortgagee*] by an instrument in writing under his hand and seal, duly assigned said bond and mortgage to the plaintiff for value, and thereby and for a consideration expressed therein, guaranteed to the plaintiff the payment of said bond and mortgage [*or*, which assignment contained a covenant, of which the following is a copy, *setting it forth*].

That on the .... day of ....., 19.., the defendants [*mortgagor*] and [*his grantee*] entered into an indenture under their hands and seals, whereby the said [*mortgagor*] conveyed to said [*grantee*] the mortgaged premises, subject to said mortgage, and said [*grantee*] covenanted that he would pay off and discharge the same as a part of the consideration of said conveyance [*or otherwise, as the covenant was*].

[*Or, where the conveyance subject to the mortgage was not signed by the grantee*]: That on the .... day of ....., 19.., the defendant [*mortgagor*] by deed dated on that day, duly conveyed said premises, subject to said mortgage, to the defendant [*owner of equity of redemption*]; which deed contained a covenant on the part of the latter, of which the following is a copy [*copy of covenant to assume mortgage*]. And said conveyance thereupon was accepted by said [*grantee*].

1570. Allegation of inadequacy of security where a receiver is desired.

[*Insert in either of the preceding forms*]: That the mortgaged premises consist of [*briefly stating the situation, e.g.*] a single village lot, with a house thereon, which is old and out of repair, and rapidly deteriorating; and the present value of the premises is about ..... dollars, and they are subject to a prior mortgage, on which about ..... dollars are due. That they are a scanty and insufficient security for the plaintiff's mortgage debt, and that the defendants, who are personally liable therefor, are insolvent.

[*And insert in the prayer for relief*]: That a receiver of the rents and profits be appointed, by order of the court, to apply the same to the plaintiff's demand.

1571. By mortgagee in possession against parties entitled to redeem, seeking accounting.

[*Allege execution of note and mortgage, default, etc., as in preceding forms, and proceed as follows*:]

That after the mortgage debt became due as aforesaid, the plaintiff entered into possession of the mortgaged premises, and the receipt of the rents and profits thereof, and has since continued, and still is, in possession.

That the said rents and profits have not been sufficient in amount to equal the annual interest upon the said bond and mortgage [*or state otherwise, as the fact may be*].

That the plaintiff has laid out considerable expenditures for permanent improvements upon said premises, to-wit [*stating the general nature and value of same*] which he claims should be allowed him as an off-set against so much of said rents and profits. And has also paid the sum of ..... dollars for taxes and assessments [*or, if any prior lien has been discharged, state the nature of the lien, amount, and time of payment of same*]; all of which sums the said plaintiff also claims should be allowed him, and credited on bis account against so much of said rents and profits; which several sums, when so applied and credited to the said plaintiff, charging the plaintiff with the amount of the rents and profits so received by him, will leave remaining due to said plaintiff, on his said bond and mortgage, about ..... dollars.

That the defendant [*junior incumbrancer*] has, or claims an interest in said mortgaged premises, under and by virtue of a mortgage thereon from the said defendant [*mortgagor*] subsequent to the mortgage of the plaintiff; and the defendant Q.... R.... has, or claims, an interest therein, etc., etc. [*setting forth generally the interest of the respective parties*].

That the plaintiff has applied to the said defendants [*junior incumbrancers*] and requested them to pay the plaintiff the said sum so due on the bond and mortgage held by the plaintiff, or come to an accounting with him thereon for the said rents and profits [permanent improvements and advances], and, after the proper charges and credits, pay the said plaintiff what should appear to be due him on his said bond and mortgage; or, in default thereof, to release their right and equity of redemption in said mortgaged premises. But the said defendants have hitherto refused, and still refuse so to do, or to comply with any part of said plaintiff's request.

WHEREFORE the plaintiff demands judgment of foreclosure and sale of said mortgaged premises as provided by law, that an account may be taken of the amount due and owing to the plaintiff for principal and interest on his said bond and mortgage; and that an account may also be taken of the rents and profits of the said mortgaged

premises which have been received by said plaintiff, and also of the expenditures of the said plaintiff for permanent improvements, and for taxes and assessments [*or*, for the amount so paid for prior incumbrances, etc., *as the case may be*] that the amount due the plaintiff be adjudged and determined [*continue as in preceding forms*].

1572. To have deed absolute declared a mortgage, and foreclosed.[2]

[*Allege existence of the debt, as in preceding forms and then allege giving of deed instead of mortgage, substantially as follows:*]

That the defendants [*mortgagors*] on or about the .... day of ....., 19.., executed, acknowledged and delivered to the plaintiff a deed in fee simple, whereby the said [*mortgagors*] conveyed and sold to the plaintiff the following described premises [*insert description*] which said deed was intended and agreed by the parties to be and to operate simply as a mortgage of said premises, and as security for the payment of the debt aforesaid with interest [*other allegations substantially as in preceding forms, inserting in demand for judgment*]; that the said deed may be adjudged to be a mortgage and a first lien upon said premises for the amount of said debt and interest.

1573. For foreclosure of mortgage, general form (Minnesota).

I. That on the .... day of ....., 19.., the defendant [*promisor*] executed and delivered to the plaintiff his promissory note, of which the following is a copy [*insert copy of note*].

II. That to secure payment of said note the defendants [*mortgagors*] at the same time duly executed and acknowledged and delivered a mortgage bearing date on that day, whereby they mortgaged, conveyed and sold to the plaintiff the following described premises with their appurtenances [*insert description*] upon consideration, however, that if

[2] For a case involving this principle, where a deed was held to be in fact a mortgage, and a number of equitable interests were involved and adjudicated upon, see Schneider v. Reed, 123 Wis. 488; 101 N. W. 682.

the said [*mortgagors*], their heirs, executors and administrators should well and truly pay or cause to be paid to the said plaintiff, his heirs, executors, administrators or assigns the said sum of ..... dollars with interest, according to the terms of said note, then said mortgage should be null and void; otherwise to remain in full force and effect. That it was further provided in and by said mortgage that [*here insert other provisions for payment of taxes insurance, etc., if any, as in Form 1568*].

III. That said mortgage was duly recorded in the office of the register of deeds, in and for the county of ..... on the .....day of ....., 19.., at .... o'clock ..M. in Book .... of Mortgages, on page ....

IV. That no part of said sum has been paid except [*state payments made*] and that there is now due on said note and mortgage the sum of ..... dollars with interest thereon from the .... day of ....., 19..

V. [That the defendants, (*mortgagors*) failed to keep said premises insured, and in consequence thereof plaintiff caused them to be insured in the M.... Insurance Company, of ..... for the term of .... from the .... day of ....., 19.., and paid therefor the premium of ..... dollars].

VI. [That the defendants (*mortgagors*) failed to pay the taxes on said premises for the year 19.. amounting an all to the sum of ..... dollars and in consequence thereof plaintiff paid the same].

VII. That no suit at law or other proceedings has been had to recover the debt secured by said note and mortgage, or any part thereof.

VIII. That the defendants [*insert names of all the defendants except those personally liable for debt*] have, or claim to have some interest in or lien upon said mortgaged premises, which interest or lien, if any, has accrued since the lien of said mortgage, and is subject thereto. That no personal claim is made against any defendant except [*name those personally liable*].

WHEREFORE plaintiff demands judgment adjudging the amount due on said note and mortgage, with costs and disbursements, including ..... dollars as attorney's fees, and ..... dollars the amounts paid by plaintiff for taxes and insurance upon the said premises; and adjudging and directing a sale of the premises aforesaid, and the payment

from the proceeds thereof of the costs and disbursements of this action, and the amount due the plaintiff as aforesaid, together with interest to the time of such payment; and that the defendants, and all persons claiming under them may be barred and foreclosed of all rights, claims, liens, and equity of redemption in said mortgaged premises, and every part thereof, except only the right to redeem the said premises within one year from the date of the order confirming said sale thereof, pursuant to the statute in such case made and provided; and that plaintiff have such other and further relief as to the court shall seem just and proper.

1574. For foreclosure of mortgage, general form (North Dakota and South Dakota).

[*In North and South Dakota the forms given in this chapter for use in Wisconsin and Minnesota may be substantially followed, with the following demand for judgment*]:

WHEREFORE the plaintiff demands judgment for the amount due on said note and mortgage, and costs and expenses of this action, together with the further sum of ..... dollars attorney's fees stipulated as aforesaid, and that the defendants and all persons claiming under them, or either of them, subsequent to the commencement of this action, may be barred and foreclosed of all right, claim, lien, and equity of redemption in the said mortgaged premises, and every part thereof; that the premises may be decreed to be sold according to law; that out of the moneys arising from the sale the plaintiff may be paid the amount adjudged to be due on said note and mortgage, with interest at the time of such payment, and costs and expenses of sale, together with the attorney's fees as aforesaid, so far as the amount of such moneys properly applicable will pay the same, and that the defendant [*promisor*] may be adjudged to pay any deficiency which may remain after applying all of said moneys so applicable thereto; and that the plaintiff may have such other and further relief, or both, in the premises as shall be just and equitable.

1575. For foreclosure, general form (Nebraska).

I. That on the .... day of ....., 19.., the said defend-

ant [*promisor*] made and delivered to the plaintiff his promissory note in writing, of which the following is a copy [*insert copy of note*].

II. That to secure the payment of said note the said defendant, on said day, executed and delivered to the plaintiff a mortgage deed and thereby conveyed to the plaintiff the following described real estate situate in ..... county of ....., viz. [*describe the premises*], which deed contained the following conditions [*insert copy of conditions*].

III. That said mortgage was duly recorded in the office of the recorder of real estate mortgages of ..... county, on the .... day of ....., 19.., in Book .... of Mortgages at page ....

IV. That the plaintiff is now the legal owner and holder of said note and mortgage, and that no proceedings at law have been had for the recovery of the debt secured thereby, or any part thereof, nor has said debt or any part thereof [except, etc.] been collected and paid, and there is now due from the defendant to the plaintiff upon said note and mortgage the sum of ..... dollars, with interest from the .... day of ....., 19..

WHEREFORE plaintiff demands judgment that an account may be taken of the amount due on said note and mortgage, that said defendants may be foreclosed of all equity of redemption or other interest in said mortgaged premises, and that said premises may be sold according to law, and out of the proceeds thereof the plaintiff may be paid the amount adjudged to be due him on said note and mortgage, wifh interest and costs of suit; that the defendant [*promisor*] be adjudged to pay any deficiency which may remain after applying the proceeds of said sale to the payment of said debts, and for such other relief as may be just and equitable.

1576. The same, where there are junior incumbrancers, and agreement to pay taxes which has been breached (Nebraska).

[*Proceed as in last preceding form, inserting before prayer for judgment*]:

V. That it was agreed in said mortgage deed that the principal sum in said note mentioned should immediately

become due and payable if said sum of money or any part thereof, or any installment of interest thereon should not be paid when due, or if the taxes and assessments against said premises were not paid at or before the time the same became by law delinquent, or if said mortgagor should fail to keep and perform all the covenants and agreements on his part to be kept and performed.

VI. That although an installment of interest on said note became due and payable on the .... day of ....., 19.., said defendant [*mortgagor*] has not paid the same, but has failed, neglected and refused to pay the same or any part thereof, whereby the whole of said debt, to-wit, ... dollars, and the interest thereon as provided for in said note and mortgage, became due and still remains due and payable from said defendant [*promisor*] to the plaintiff.

VII. That the defendants [*name junior incumbrancers*] have or claim to have some interest in or lien upon said premises, which said interests or liens, if any, are junior and subject to the lien of said mortgage of the plaintiff, but no personal claim is made against any of said defendants except the said [*promisor*].

WHEREFORE the plaintiff demands judgment that an account may be taken by this court of the amount due the plaintiff on his said note and mortgage; that the plaintiff be adjudged to have a first lien on the mortgaged premises for the amount so found due, and that the liens of, and interest in the premises of each and all the defendants, if any they have, be adjudged to be junior and inferior to the lien of the plaintiff. That the defendant [*the mortgagor*] be adjudged to pay the plaintiff the sum so found due; that in default of such payment the mortgaged premises may be sold according to law, and that each and all of the defendants in this cause may be forever barred and foreclosed of any and all right, title, interest or equity of redemption in and to said premises; that out of the proceeds of the sale thereof the plaintiff may be paid the amount found due him, together with his costs herein expended; and for such other and further relief as may be just and equitable.

1577. Petition in mortgage foreclosure, general form (Iowa).

[*Title.*] Petition in Equity.

The plaintiff alleges:

I. That on or about ....., 19.., the defendant C.... D.... executed and delivered to the plaintiff his certain promissory note of which the following is a copy [*insert copy*].

II. That to secure the payment of said note the said defendant C.... D.... together with his wife the defendant E.... F.... executed and delivered to the plaintiff their certain mortgage deed covering the following described real estate, to-wit: [*insert description*] a copy of which mortgage is hereto annexed, marked exhibit "A" and made part of this petition.

III. That said mortgage was duly filed for record in the office of the recorder of deeds of ..... county, Iowa, on the .... day of ....., 19.., at .... o'clock .. M., and duly recorded in Book .... page ....

IV. That said note is still plaintiff's property, is due and is wholly unpaid.

V. That the defendants L.... M.... and N.... O.... have or claim to have some lien or interest to said premises, but the plaintiff alleges that whatever lien or interest the said defendants or either of them, have in the said premises the same is junior and inferior to the lien of the plaintiff's said mortgage.

VI. That since the execution of said mortgage, to-wit: On the .... day of ....., 19.., plaintiff has paid taxes on said premises, duly levied, amounting to the sum of ..... dollars.

VII. That the plaintiff has been to the expense of ..... dollars for an abstract of the title to said mortgaged premises, preparatory to the foreclosure of said mortgage.

WHEREFORE the plaintiff demands judgment against the said [*name defendants personally liable*] for the amount due upon said promissory note, and for the amount paid to discharge the taxes on the mortgaged premises, with .... per cent interest from the time the same were paid, and for said abstract of title, to-wit: For the sum of .....

dollars, with interest and costs, including an attorney's fee of ..... dollars, and aks that said judgment be decreed to be a lien upon said mortgaged premises from the date of said mortgage, to-wit: The .... day of ....., 19.., and that the lien of the said defendants, and each of them upon the said mortgaged premises may be decreed to be junior and inferior to the plaintiff's mortgage; that the equity of redemption of the said defendants, and each of them, be forever barred and foreclosed, and that a special execution issue for the sale of said mortgaged premises or so much thereof as may be necessary to satisfy said judgment with interests and costs. And that the court may order and decree that if it becomes necessary to sell any part of said mortgaged premises to satisfy said judgment, that a sufficient amount thereof be sold to satisfy not only said judgment, but the notes described in said mortgage which are not yet due. And that the court adjudge and decree if any part of the said mortgaged premises be sold under this decree and not redeemed within one year from the date of the sale, that a writ of possession shall issue under the seal of this court, directed to the sheriff of said county, commanding him to put the purchaser under this foreclosure in possession thereof.

R.... S....
Attorney for Plaintiff.

[*Venue*].

I, R.... S.... on oath depose and say that I am one of the plaintiff's attorney's in this suit and have in my possession for collection the note and mortgage described in the above petition, and that the statements thereof are true as I verily believe.

R.... S....

[*Jurat.*]

1578. The same, another form (Iowa).

[*The forms given for use in Nebraska may be substantially followed, attaching a copy of the mortgage and adding thereto, if the facts call for it, the following:*]

That the defendant [*mortgagor*] failed and neglected to pay the taxes levied and assessed upon said premises for the year 19.., whereby the plaintiff was compelled to and

did, on the .... day of ....., 19.., pay the said taxes so levied amounting to the sum of ..... dollars, and that the plaintiff had necessarily expended the sum of ..... dollars for an abstract of title of said premises preparatory to the bringing of this action.

[*Prayer for judgment as follows:*]

WHEREFORE plaintiff demands judgment against the said defendant [*promisor*] for the sum of ..... dollars, with interest from ....., 19.., together with the said sum of ..... dollars paid to discharge tax liens as aforesaid with interest thereon at .... per cent from the date of payment, also for the sum of ..... dollars paid for abstract of title, and for costs, including attorney's fee of ..... dollars; that said judgment be decreed to be a lien upon said mortgaged premises form the .... day of ..... 19.., [*date of mortgage*]; that the liens and interest of the defendants and each of them be decreed to be junior and subject to the lien of the plaintiff, and they and each of them be forever barred and foreclosed from all title, claim, lien, interest or equity of redemption in the said mortgaged premises, and that a special execution issue for the sale of said premises or so much thereof as shall be necessary to satisfy said judgment, with interest and costs;* and that it be forever adjudged that in case any part of said premises be sold under said judgment and be not redeemed within one year from the date of such sale, that a writ of possession issue out of this court directed to the sheriff of said county, commanding him to put the purchaser under such sale in possession of said premises, and for such further relief as may be equitable.

1579. The same, amount not all due (Iowa).

[*Follow preceding form, adding to the prayer at the*:*] and that the court adjudge and decree that in case it becomes necessary to sell any part of said premises to satisfy said judgment, that a sufficient amount thereof be sold to satisfy not only the said judgment, but the principal and interest of said note which is yet to become due.

1580. For foreclosure of title bond (Iowa Ann. Code 1897 sec. 4297).

I. That on the .... day of ....., 19.., the plaintiff was the owner in fee of the following described real estate [*insert description*].

II. That on the .... day of ....., 19.., the plaintiff sold said real estate to the defendant [*naming him*] for the sum of ..... dollars and that said defendant in part payment thereof executed to this plaintiff his certain promissory note, of which the following is a copy [*insert copy of note*].

II. That at the time of the execution of said note this plaintiff executed and delivered to the said defendant his certain title bond to said premises, a copy of which is attached hereto marked Exhibit A, and made a part hereof.

IV. That said bond was duly filed for record in the office of the recorder of deeds of ..... county, Iowa, on the .... day of ....., 19.., and duly recorded in Book .... page ....

V. That said note is still owned and held by the plaintiff and that there is now due and unpaid thereon the sum of ..... dollars with interest from ....., 19..

VI. That the defendants [*naming them*] have or claim to have some lien upon, or interest in, said premises, but that whatever lien or interest the said defendants or either of them may have in said premises is junior and inferior to the lien of plaintiff thereon.

VII. [*Insert allegations as to taxes and abstract, as in preceding forms, if the facts warrant.*]

WHEREFORE the plaintiff demands judgment that the defendant [*promisor*] be required to specifically perform his said contract, or that in case he fail and neglect so to do that the plaintiff have judgment against the said [*promisor*] for the sum, etc. [*follow prayer for judgment as in last two forms*].

1581. For foreclosure of chattel mortgage, general form.[3]

I. [*Allege the indebtedness and the giving of a note or other evidence thereof, as in preceding forms in this chapter.*]

II. That to secure the payment of said note the defendant on the .... day of ....., 19.., executed and delivered to

the plaintiff an instrument in writing duly signed [*and acknowledged*] by said defendant, by which he conveyed to the plaintiff as security for said note the following described goods and chattels, viz. [*describe goods as in the mortgage, or attach copy of mortgage as part of complaint*].

III. That on the .... day of ....., 19.., the said instrument was duly filed for record in the office of the [*state proper officer*].

IV. That the defendant did not pay said note when the same became due, nor has he yet paid the same, or any part thereof, and no proceedings have been had at law for the recovery of said debt, and that there is now due from the defendant to the plaintiff thereon the sum of ..... dollars, with interest from ....., 19..

WHEREFORE plaintiff demands judgment against the said defendant for the sum of ..... dollars, with interest from the .... day of ....., 19.., with costs, and that said goods may be ordered sold as provided by law, and the proceeds thereof applied in payment of the amount so adjudged with costs; that the defendant be barred and foreclosed of all right, interest, or lien in or upon said property, and that the plaintiff have such other and further relief as may be just.

1582. The same, where there are subsequent incumbrancers.

[*Proceed as in last preceding form, inserting*]:

That the defendants [*name subsequent incumbrancers or lien-holders*] have or claim to have some interest in or lien upon said mortgaged property, which they and each of

[3] In North Dakota foreclosure of chattel mortgages and other liens on personal property is authorized by statute. N. Dak. Rev. Codes 1905 sec. 7512 *et seq.* In states where there is no such express statutory provision, foreclosure of chattel mortgages by action in equity may generally be maintained in cases where there is no power of sale in the mortgage, or where by reason of conflicting claims of other lienholders or other extrinsic facts it becomes necessary or desirable to ascertain and establish the rights of all parties by judgment of a competent court. Bank v. Damm, 63 Wis. 249; 23 N. W. 497; Forepaugh v. Pryor, 30 Minn. 35; 14 N. W. 61; Packard v. Kingman, 11 Iowa, 219.

Where there are no such circumstances, and the objection of adequate remedy at law is properly taken, the right to foreclose in equity may be doubtful.

them claim is superior to the interest of this plaintiff therein, but which are in fact subject and inferior to the plaintiff's said mortgage lien.

[*If by statute a right of redemption is preserved after sale insert in the prayer after the demand that the defendant be barred and foreclosed of all right in the mortgaged property as follows:* except the right to redeem from the sale herein adjudged in the manner provided by law.]

1583. For foreclosure of a bill of sale of chattels given as a chattel mortgage (adapted from First Nat. Bank v. Damm, 63 Wis. 249; 23 N. W. 497).

I. [*Allege indebtedness as in previous forms in this chapter.*]

II. That to secure payment of said indebtedness the defendant [*promisor*] on the .... day of ....., 19.., executed and delivered to the plaintiff a bill of sale of the following described personal property [*describe same*] a copy of which bill of sale is attached hereto and marked Exhibit A, and that it was then and there understood and agreed by the parties thereto that the same was given and was to operate only as a chattel mortgage of the property therein described to secure the payment of said indebtedness, and that if said defendant should pay the said indebtedness at the time and in the manner agreed upon in said note then the said bill of sale should be null and void.

III. That the said bill of sale was duly filed for record as a chattel mortgage in the [*proper office*] on the .... day of ....., 19..

[*Allege default, and claims of other defendants as in the last two preceding forms.*]

[*Insert in demand for judgment:*] That the said bill of sale be adjudged to be a chattel mortgage upon said property, and that the plaintiff recover judgment against the said [*promisor*] for the sum of, etc. [*proceed as in last two preceding forms*].

1584. For foreclosure of pledge (Iowa Ann. Code 1897 sec. 4286).

I. [*State indebtedness as in previous forms in this chapter.*]

II. That to secure payment of the said indebtedness, and as collateral security therefor, the defendant [*pledgor*]

on the .... day of ....., 19.., pledged and delivered to this plaintiff the following described personal property [*insert description*] upon the understanding and agreement then and there made between the said parties that in case the said defendant [*pledgor*] should well and truly pay the plaintiff the indebtedness aforesaid, with interest as agreed, then the said pledged property should be returned to the said defendant and the claim of the plaintiff thereon should be released, otherwise that the said pledge should remain in full force and effect [*state any special agreement made by the parties*].

III. [*State default, etc., substantially as in the previous forms given for foreclosure of chattel mortgages.*]

[*Demand for judgment substantially as in chattel mortgage foreclosure.*]

1585. Complaint for strict foreclosure of land contract.

I. That on the .... day of ....., 19.., the plaintiff being the owner of the premises hereinafter described, entered into a written contract to sell and convey the same to the defendant C.... D.... upon the terms and conditions in said contract set forth, a copy of which contract is attached hereto made part of this complaint and marked Exhibit A.

II. That although the sum of ..... dollars became due to the plaintiff on said contract on the .... day of ....., 19.., as principal and interest, yet the same has not been paid, and said defendant has neglected and refused to pay the same, or any part thereof, except, [*if any payments have been made state them*].

III. That the plaintiff now is and at all times has been ready and willing to perform said contract on his part.

IV. That said premises are described as follows [*insert description*].

V. That the defendant is now and has been since the date of said contract in possession of said premises and the enjoyment of the use, rents and profits thereof, and refuses to surrender up said contract to be canceled and refuses to deliver up the said premises to the plaintiff.

VI. That no proceedings, except this action, have been

commenced at law or otherwise for the collection of the sums due on said contract or any part thereof.

VII. That the defendants [*name any other defendants, including the wife of the defendant who may have any interest in the premises which may be barred by the strict foreclosure*], have or claim to have some lien, interest or claim, in, to or upon said premises, which lien, interest or claim, if any they or any of them have, is derived from said defendant C.... D...., and is subordinate and subject to the rights of the plaintiff.

WHEREFORE the plaintiff demands judgment against the defendants: (1) That the defendant C.... D...., purchaser as aforesaid, pay or cause to be paid to the plaintiff, or bring into court to be so paid the amount actually due upon the contract aforesaid as principal and interest thereon by a day certain to be named by the court within such short, reasonable time as to the court shall seem proper, together with the costs of this action; (2) That in default of such payment, so to be required by the court, the said defendants [*name them*] and all persons claiming under them or any or either of them subsequent to the filing of the notice of the pendency of this action, be forever barred and foreclosed of all right, title, interest, claim and equity of redemption in and to said lands and premises, or any part, parcel or portion thereof; (3) That the plaintiff have and recover the costs and disbursements of this action of said defendant C.... D.... and that he have such further relief as may be just and equitable.

1586. Complaint to enforce forfeiture of land contract (Minnesota).

I, II, III, IV, V and VI. [*As in last preceding form.*]

VII. That on ....., 19.., plaintiff duly served upon defendant a notice terminating said contract, as provided by section 8081 of the General Statutes of Minnesota for 1913, of which notice the following is a copy [*insert copy*].

WHEREFORE plaintiff demands judgment adjudging the amount due plaintiff from defendant under said contract, and fixing a day at or before which defendant shall pay the same, and in default of such payment that said contract be forfeited and plaintiff have restitution of said premises, and for such other relief as may be just, with costs.

1587. To revive mortgage and for subrogation in favor of one who has paid it expecting to receive a new one.

I. [*Allege the title of the real estate showing it to be in the principal defendant and set forth the execution of the mortgage and its terms in legal effect, or give copy.*]

II. That, thereafter, and after the said mortgage became due, and on or about the .... day of ....., 19.., at the urgent solicitation of said defendants, [*name mortgagors*] and upon and in consideration of their promise, which they then and there made to execute to the plaintiff a mortgage on said premises for said sum, with interest at .... per cent per annum, payable in .... years, the plaintiff, loaned said defendant, [*mortgagor*] the sum of ..... dollars, for the purpose of satisfying and with which he satisfied said mortgage, and satisfaction thereof was duly recorded in the said registry on the .... day of ....., 19..

III. That although requested so to do before the commencement of this action, the said defendants have refused and still refuse to execute said mortgage to the plaintiff.

IV. That thereafter, to-wit, on the .... day of ....., said [*name mortgagors*] for the purpose of defrauding the plaintiff and preventing him from having security upon said premises, conveyed the same to the defendant, C.... D.... who at the time of taking said conveyance well knew of the said loan and promise by the said [*mortgagors*] to secure the same by mortgage on said premises, and that the same had not been paid, and of the fraudulent intent and purpose of said [*mortgagors*] in conveying the same to him.

V. That said [*mortgagor*] has no other property than said land out of which said claim can be collected.

WHEREFORE the plaintiff demands judgment: (1) That said first-mentioned mortgage be revived as to the parties hereto, to the amount of said debt to the plaintiff, and interest, and that the plaintiff be subrogated to the rights of the mortgagee therein; (2) That the satisfaction of the same heretofore made be canceled of record and the plaintiff's said claim be declared a mortgage lien upon said land; (3) That the said conveyance to C.... D...., above mentioned, be adjudged to be subordinate and subject to

the equities of the plaintiff herein. [*Add prayer for the usual relief in case of mortgage foreclosure.*]

1588. Outline of complaint by trustee to foreclose mortgage or deed of trust from corporation, for the benefit of bond holders.

I. [*Allege corporate character of defendant as in Form 848.*]

II. [*Allege execution of the bonds and coupons in suit describing them by stating their legal effect or by attaching a copy and allege the negotiation and sale thereof and that they are held by divers persons unknown to the plaintiff.*]

III. [*Allege the execution of the mortgage or trust deed to secure the bonds, giving copy or pleading legal effect and description of property covered.*]

IV. [*Allege acceptance of trust by plaintiff and recording of the mortgage in proper office.*]

V. [*Set forth the default or defaults in the covenant of the bonds or mortgage.*]

VI. [*Allege demand upon plaintiff by bond holders to bring the action showing that the required number of bond holders have joined in the demand.*]

VI. [*Allege the amounts due, and that no proceedings have been had for the recovery thereof.*]

VII. That the defendants [*naming them*] have, or claim to have, some interest in, or lien upon, the aforesaid mortgaged property, or some portion thereof, which interest or lien, if any, has accrued subsequently to the lien of the said mortgage and trust deed.

WHEREFORE plaintiff demands judgment: (1st) That the defendants, and all persons claiming under them, or either of them, subsequent to the filing of a notice of the pendency of this action, may be barred and foreclosed of all right, claim, lien and equity of redemption in the said mortgaged property; (2d) That the said mortgaged property may be decreed to be sold, according to law; (3d) That out of the proceeds of such sale, the plaintiff be paid the costs and expenses of this action; that it be ascertained who are the owners and holders of the said bonds, and that to such persons shall be paid the amounts due upon their respective bonds, with interest to the time of such payment; that in case of deficiency, the moneys properly applicable

thereto shall be paid to them *pro rata;* that the defendant, the [*name corporation*] may be adjudged to pay any deficiency which may remain after the application of all of said moneys so applicable thereto, and that the plaintiff have such other relief as may be just and equitable.

CHAPTER LXV.

COMPLAINTS IN ACTIONS TO REDEEM MORTGAGED PREMISES.

1589. By mortgagor against mortgagee.
1590. The same, where mortgagee is in possession.
1591. By junior mortgagee against purchaser under foreclosure of a senior mortgage, plaintiff not being a party to the former action.
1592. By a grantor to have a deed declared a mortgage, and to redeem therefrom.
1593. By lessee of mortgagor.

This is an equitable action and may be maintained by the mortgagor or by any one having a definite interest in the mortgaged premises, and who has no adequate remedy at law. Thus, assignees or grantees of the equity of redemption, heirs, devisees, and personal representatives of the mortgagor, junior incumbrancers or judgment creditors may maintain the action.

It is not necessary to the right that a tender be made before action, or that the money be deposited in court, though these allegations are frequently made and may affect the question of costs; it is sufficient, however, so far as the right to maintain the action is concerned, that the complaint allege a readiness to pay whatever is due.

1589. By mortgagor against mortgagee.

I. That on the .... day of ....., 19.., the plaintiff executed to the defendant a bond under his hand and seal, dated that day, conditioned to pay, etc. [*state condition of bond, or if note was given describe the same*] and, being owner in fee [*or otherwise*] of the premises hereinafter described, executed to the defendant a mortgage of even date herewith, to secure the payment thereof, whereby the plaintiff granted, bargained, and sold to the defendant the said premises, upon the condition nevertheless that [*state condition of the mortgage*] which said premises are described as follows: [*insert description from mortgage*].

II. That the plaintiff has paid to the defendant all the interest due on said ..... dollars from the .... day of ....., 19.., up to the .... day of ....., 19..; and that on the .... day of ....., 19.., when [*or*, and after] the said mortgage became due, he tendered to the defendant the sum of ..... dollars, together with all the interest [and costs] due thereon, and ever since has been ready and willing to pay the same, and herewith brings the same into court for the use of the defendant, but the defendant has at all times refused to receive the same, or to deliver up said mortgage to be cancelled.

WHEREFORE the plaintiff demands judgment that an account be taken of the amount now due the defendant on said bond and mortgage for principal, interest [and costs]; and that the plaintiff may be at liberty to redeem said mortgaged premises upon payment of whatever may be found so due; and that the defendant, upon payment thereof, acknowledge satisfaction of said mortgage, and discharge the same of record, and that the plaintiff have such further relief as may be equitable.

1590. The same, where mortgagee is in possession.

I. [*As in last preceding form.*]

II. That the plaintiff has paid to the defendant the interest accruing on said bond [*or* note] and mortgage up to and including the .... day of ....., 19.., to-wit the sum of [*here state payments, and when made*] and on the .... day of ....., 19.., duly tendered to the defendant the further sum of ..... dollars which said defendant refused and still refuses to receive.

III. That on or about the .... day of ....., 19.., the defendant entered into possession of said premises, and has ever since retained possession thereof, and received the rents and profits of the same, amounting to the sum of ..... dollars [*or*, amounting to a sum greater than the amount due on said mortgage] which sum he has applied to his own use.

IV. That on the .... day of ....., 19.., the plaintiff applied to the defendant to account for said rents and profits, and to pay the plaintiff the amount of the excess thereof over and above said mortgage debt, and to deliver possession of said premises to the plaintiff and discharge said mortgage which defendant then refused and still refuses to do.

WHEREFORE the plaintiff demands judgment that an account be taken of the amount due on said note [*or* bond] and mortgage, and also of the rents and profits of said premises so received by the defendant, and that plaintiff be permitted to redeem the said premises upon payment of the amount, if any, which may be found due the said defendant, and that defendant be required to discharge and cancel said mortgage of record, and deliver the possession of said premises to the plaintiff, and for such further relief as may be equitable.

1591. By junior mortgagee against purchaser under foreclosure of a senior mortgage, plaintiff not being a party to the former action.

I. That on the .... day of ....., 19.., one E.... F.... executed and delivered to one G.... H.... a mortgage upon the following described real estate [*insert description*] to secure payment of the sum of ..... dollars and interest, due in .... years from that date, according to the conditions of a certain promissory note of even date with said mortgage.

II. That on the .... day of ....., 19.., a judgment of foreclosure and sale was duly rendered on said mortgage in the ..... court of ..... county in a certain action then and there pending and said premises were thereafter duly sold under said judgment to the defendant for the sum of ..... dollars, which sale was thereafter duly confirmed by said court, and a deed duly executed and delivered to the defendant, who ever since has been and is now in possession of said premises.

III. That on the .... day of ....., 19.., said E.... F.... executed and delivered to the plaintiff his promissory note in writing, in the words and figures following [*set forth copy of note, or plead legal effect*].

IV. That to secure the payment of said note said E.... F.... on said day executed and delivered to plaintiff a mortgage and thereby granted, bargained and sold to plaintiff the above described premises, upon condition nevertheless that [*here state condition*].

V. That said mortgage was duly recorded in the office of the .... of deeds, of ..... county on the .... day of ....., 19..

VI. That said E.... F.... has not paid the amount secured by said last named mortgage, as required by the conditions thereof, and that no proceedings have been had at law or in equity for the recovery of the debt secured thereby, nor has any part thereof been collected and paid, and there is now due thereon the sum of ..... dollars.

VII. That in the said action to foreclose the mortgage under which the defendant claims title to said premises, the plaintiff was not made a party, nor did he appear in the action, nor does the judgment in that action affect his right in the premises.

VIII. That on or about the .... day of ....., 19.., the plaintiff duly tendered to defendant the amount due on his said foreclosure judgment, with interest to that date, and demanded that defendant release and convey said premises to the plaintiff and that defendant refused so to do.

WHEREFORE the plaintiff demands judgment that he be allowed to redeem said premises upon paying to the defendant the amount of defendant's said judgment, with interest within a reasonable time to be fixed by the court, and that upon such payment the defendant be required to release and convey to the plaintiff all his right, title and interest in said premises acquired under said judgment, and under said sale, and that the defendant surrender possession of said premises to the plaintiff and for such further relief as may be equitable.

1592. By a grantor to have a deed declared a mortgage, and to redeem therefrom.

I. That on the .... day of ....., 19.., the plaintiff was the owner and in possession of the following described premises [*insert description*] of the value of ..... dollars.

II. That on said day the plaintiff, being in embarrassed circumstances, borrowed of the defendant the sum of ..... dollars for .... years, with interest at .... per cent. [*if note was given, set forth the fact*].

III. That to secure the payment of said loan the plaintiff executed and delivered to defendant a warranty deed in fee simple of said premises, which deed though absolute in form, was intended by both plaintiff and defendant to be a mortgage only, and to stand as security for the repayment of said loan, and to serve no other purpose.

IV. That on the .... day of ....., 19.., said defendant entered into possession of said premises, under said deed, and has received the rents and profits thereof and applied the same to his own use, which said rents and profits amount to the sum of ..... dollars.

V. That on or about the .... day of ....., 19.., the plaintiff offered to pay said defendant the amount of said loan, over and above the rents and profits so received by him, and requested him to account for the rents and profits of said premises, and to deliver up possession of the same upon being paid whatever sum should be found to be justly due him upon said account, but said defendant then refused, and still refuses, to account with the plaintiff, but insists upon retaining possession of said estate.

VI. That the plaintiff is ready to pay whatever may be justly due on said loan, and hereby offers to bring the money into court for that purpose.

WHEREFORE plaintiff demands judgment that an account may be taken of the amount due said defendant, after deducting the rents and profits received, and that upon the payment by plaintiff of the amount so found due, said defendant be required to reconvey said premises to the plaintiff, and for such other relief as may be equitable.

1593. By lessee of mortgagor.

I. That on the .... day of ....., 19.., the defendant [*mortgagor*] was the owner in fee of the following described premises, and leased the same to the plaintiff by an indenture dated on that day, a copy of which is annexed as a part of this complaint; and that by virtue of said lease the plaintiff entered upon, and ever since has been and still is, in possession of said premises, and is vested with the unexpired term thereof; which premises are [bounded and] described as follows [*description*].

II. That on the .... day of ....., 19.., said [*mortgagor*] made to the defendant [*mortgagee*] a mortgage upon the same premises, to secure ..... dollars, payable on the .... day of ....., 19..

III. That on the said day the mortgage became due, but has not been paid; and that said [*mortgagee*] has commenced an action [*or, proceedings under the statute*] to foreclose the same for such default.

IV. That on the .... day of ....., 19.., the plaintiff tendered ..... dollars to said [*mortgagee*] being the amount due on said mortgage, with interest, and the cost of said action [*or*, proceeding] up to that time, in redemption of said mortgage, and has ever since been ready and willing to pay the same; and did then request him to assign the same to the plaintiff, but he refused so to do.

WHEREFORE the plaintiff demands judgment that he be allowed to redeem the said mortgage upon paying to the defendant [*mortgagee*] the amount due upon the mortgage; and that upon such payment the defendant, by an assignment duly executed and acknowledged by him, assign said bond and mortgage to the plaintiff; and that the plaintiff have such further relief as may be equitable.

CHAPTER LXVI.

COMPLAINTS FOR SPECIFIC PERFORMANCE OF CONTRACTS.

1594. Vendor against purchaser.
1595. The same, when time has been extended by agreement.
1596. Purchaser against vendor, claiming interest on purchase money which has lain idle, and deduction for deficiency and for outstanding incumbrance.
1597. Upon an exchange of property, possession having been taken.
1598. By vendee against vendor to enforce oral contract of sale when contract has been so far performed as to take the case out of the statute of frauds.
1599. By creditor, for performance of agreement to give a chattel mortgage.
1600. By lessee for specific performance of an agreement to lease real estate.
1601. For specific performance of an agreement to execute a chattel mortgage on personal property, and to set aside fraudulent disposition of the property.
1602. To enforce specific performance of an agreement by a railroad to construct a farm crossing.
1603. Outline of complaint for reformation of contract and specific performance thereof as reformed.
1604. On an exchange of lands, both parties having taken possession.
1605. To enforce performance of a contract to transfer corporate stock.
1606. Outline of complaint by adopted child to compel performance of agreement to give him a specified share of estate.
1607. To enforce specific performance of contract in relation to mines, compel conveyance of claims, and accounting.
1608. To enforce a contract for sale on joint account of mining claims to a corporation, to declare a trust in the corporate stock received by defendant therefor, and for damages.

The action for specific performance is purely equitable, and while controlled by settled legal principles a decree is never demandable as a matter of abstract right, but is within the sound discretion of the court under established principles of equity. It will never be granted if there is an adequate remedy at law; the plaintiff must always be ready to do equity, and the court may impose equitable terms upon the

plaintiff. A contract may be reformed and specifically enforced in the same action, but the court will ordinarily refuse its aid where the contract lacks certainty as to its essential terms or where any of such terms depend on the will, discretion or personal acts of individuals which cannot be controlled by the court. Park v. Ry. Co., 114 Wis. 347. Nor will a court decree specific performance when the contract is not fair, just and reasonable in all its parts. Mulligan v. Albertz, 103 Wis. 140. If the action be for specific performance of a contract for sale of lands, it is not necessary to allege in the complaint that the plaintiff has no adequate remedy at law, such contracts being enforced as a matter of course; but if the contract be for sale of personalty the peculiar facts which take the case out of the general rule that money damages are an adequate remedy for the breach must be stated. 20 Enc. Pl. & Pr., p. 438, notes.

1594. Vendor against purchaser.

I. That on and before the .... day of ....., 19.., the plaintiff was and still is the owner in fee [*or otherwise*] and possessed of certain real property hereinafter described.

II. That the defendant, being desirous to purchase the same, entered into an agreement in writing with the plaintiff, dated on that day, of which the following is a copy [*copy of contract, giving a description of the property*, of which a copy is attached hereto and made a part of this complaint, marked Exhibit A; *or set forth the legal effect of the contract*].

III. That the defendant then paid to the plaintiff ..... dollars as part of the purchase money mentioned in said contract.

IV. That the plaintiff has always been, and still is, ready and willing to perform the said agreement on his part; and, on being paid the remainder of said purchase money [with interest] to convey, etc. [*as by the agreement*] and to let the defendant into possession of said premises, and the rents and profits thereof, from the time in the agreement specified.

V. That on the .... day of ....., 19.., at ..... the plaintiff duly tendered to the defendant a deed of the said premises pursuant to the agreement; but the defendant then and ever since has refused to accept the same and to pay the

balance of the purchase money [*or*, and to give the bond and mortgage agreed for, *or otherwise, according to the contract*].

WHEREFORE the plaintiff demands judgment that the defendant perform said agreement, and pay to the plaintiff ..... dollars, the remainder of said purchase-money, with interest from the .... day of ....., 19.., the time when it ought to have been paid [*or*, and give to the plaintiff the bond and mortgage] and that the plaintiff have such other or further relief as may be equitable, and that he recover the costs of this action.

1595. The same, when time has been extended by agreement.

[*Insert in the foregoing form, between allegations IV and V the following allegation*]*:*

That thereafter and on or about the .... day of ....., 19.., the plaintiff and defendant entered into an additional written agreement, by the terms of which the time of performance of said first described contract, and the payment of the money therein mentioned [*or*, of the delivery of the bond and mortgage aforesaid] was duly extended to the .... day of ....., 19.., at ..... at the hour of .... o'clock a. m.

1596. Purchaser against vendor, claiming interest on purchase money which has lain idle, and deduction for deficiency and for outstanding incumbrance.

I. That on the .... day of ....., 19.., the defendant, being owner in fee [*or otherwise*] and possessed of certain real property herinafter described, and desirous to dispose of the same, made [by one M.... N.... his agent, duly authorized thereto] an agreement in writing with the plaintiff, of which a copy is attached hereto, made a part of this complaint, and marked Exhibit A [*or set forth agreement made according to its legal effect*].

[II. That on the execution thereof the plaintiff paid to the defendant ..... dollars as a part payment of the purchase money therein mentioned.]

[III. That afterwards, by mutual agreement between the plaintiff and the defendant, the time for completing said contract was extended to the .... day of ....., 19..]

IV. That the plaintiff duly performed all of the conditions thereof on his part, and has always been ready and willing, and still is, to fulfill the agreement on his part; and, on having a good and marketable title made of said premises, and a conveyance of the fee thereof, free from all incumbrances [*or otherwise, according to the contract*] to pay the residue of the purchase money to the defendant [*and to give the bond and mortgage agreed*].

V. That on the day last mentioned, at ..... the plaintiff duly tendered to the defendant said sum of ..... dollars, and requested such a conveyance [and offered to give the bond and mortgage agreed for, on receiving the same], but the defendant refused and still refuses, to execute or deliver such conveyance.

VI. [*Where purchase money lay idle*]: That ..... dollars, the residue of said purchase money, has been ready and unproductive in the hands of the plaintiff, for completing the purchase, ever since the said day on which it ought to have been completed.

VII. [*Where there is a deficiency*]: That since the making of said agreement the plaintiff has discovered that there is a deficiency in the quantity of said .... and that the same does not contain .... acres, but only ....acres.

VIII. [*Where a claim of a right of way proved to be unfounded*]: That at the time of treating for said contract said [*defendant or agent*] represented to the plaintiff that there belonged to the said estate a right of way from the said estate to ..... street, and that the said [*defendant*] could make a good title in fee to the said right of way, which said right of way rendered the said estate very convenient for the business which the plaintiff intended to carry on upon the said premises; and that before the agreement of the said .... day of ....., 19.., was signed, a certain plan made for the purpose of showing how buildings might be erected on the said estate, was shown to the plaintiff by the said [*defendant or agent*] and upon that building-plan the said right of way was delineated; and by the said building-plan, and the representations of the said [*defendant or agent*] the plaintiff was led to expect that he should have a right of way directly from the said estate to ..... street, and the expectation of having such right of way was a great inducement to the plaintiff to purchase the said estate, and when the said agreement was

signed, the said building-plan was delivered to the plaintiff, and the same is now in the plaintiff's possession; but since the signing of the said agreement one [*an adverse claimant*] has claimed to be exclusively entitled to the said right of way, and she brought an action in the ..... court for the recovery of the possession thereof, and in that action she obtained a verdict, and she has recovered possession of the said road or way from the said estate to ..... street, and she has since sold the same, and that the plaintiff is now prohibited from using the said road or way; and that the plaintiff, in the expectation that he should have a good title made to the said estate, entered into the possession thereof soon after signing the said agreement, and has ever since been, and now is, in the possession thereof, and has, at a great expense, to-wit, ... dollars, purchased a piece of ground, and made a road from the estate to ..... street.

IX. [*Where there is an outstanding incumbrance*]: That the defendant's title to the premises is incumbered by a mortgage to one M.... N.... for ..... dollars, with interest semi-annually, which mortgage is not payable until the .... day of ....., 19..

WHEREFORE the plaintiff demands judgment that a just deduction from the purchase money be made on account of said deficiency, and on account of the plaintiff not having the benefit of said right of way, and on account of said incumbrance, and for interest on plaintiff's purchase money which has lain idle; and that on payment of the residue of said purchase money [*or*, in delivery of said bond and mortgage] the defendant be adjudged to specifically perform said agreement; and that the plaintiff have such further relief as may be equitable, with the costs of this action.

1597. Upon an exchange of property, possession having been taken.

I. That on the .... day of ....., 19.., the plaintiff and the defendant entered into an agreement in writing, dated that day, whereby in consideration of the covenants on the part of the plaintiff hereinafter mentioned, the defendant covenanted that he would, on or before the .... day of ....., 19.., convey to the plaintiff in fee by warranty deed, and with covenants for quiet enjoyment and against incum-

brances [*or otherwise, according to the agreement*] a lot of land situate in the town of ..... and county of ..... in the state of ..... and described as follows [*description of premises*]. In consideration whereof the plaintiff covenanted in and by said agreement [*state his covenant in same manner*]. And it was further provided in said agreement that each party might enter into immediate possession of the premises so to be conveyed to him, and have and receive the profits to his own use. [*or attach copy of the agreement*].

II. That thereafter, in pursuance of said agreement, the plaintiff and the defendant respectively took possession of the premises so to be conveyed to them, and still severally occupy the same.

III. That the plaintiff duly performed all the conditions of said contract on his part, and on the .... day of ....., 19.., tendered to the defendant a warranty deed of said premises in ..... with covenants for quiet enjoyment and against incumbrances, duly signed and sealed by the plaintiff, and demanded of him a deed of said premises in ..... ; but the defendant refused to execute and deliver such to the plaintiff, and still neglects so to do.

WHEREFORE the plaintiff demands judgment that the defendant specifically perform his said agreement and convey to the plaintiff the said lot and land which by said agreement he contracted to convey, and that he be required to receive plaintiff's said deed, and that the plaintiff have such further relief as may be equitable, and the costs of this action.

1598. By vendee against vendor to enforce oral contract of sale when contract has been so far performed as to take the case out of the statute of frauds.

I. That the defendant was on the .... day of ....., 19.., the owner in fee of the following real estate [*insert description*], and that defendant still has the legal title to said lands.

II. That on said day defendant sold said premises to the plaintiff for the sum of ..... dollars, payable [*state terms*] by an oral contract, whereby he agreed to convey said premises to plaintiff by a warranty deed upon the payment by the plaintiff of the consideration aforesaid.

III. That defendant thereupon delivered the possession of said premises to the plaintiff under said contract, and the plaintiff has ever since been and still is in possession of the same under said contract.

IV. That plaintiff has paid to the defendant the entire consideration aforesaid [*or*, the following sums to apply upon said consideration, to-wit, *state amounts and when paid*].

V. That there is still due said defendant the sum of ..... dollars under said contract, which sum the plaintiff tendered to the defendant on the .... day of ....., 19.., but the defendant then refused and still refuses to execute and deliver a proper deed of said premises to the plaintiff.

VI. That plaintiff, while in possession of said premises under said contract, has erected a building upon said premises [*or made other improvements, specifying them*] of the value of ..... dollars.

VII. That plaintiff has duly performed all of the conditions of said contract on his part, and now brings the balance of the purchase money, to-wit, the sum of ..... dollars into court, and offers the same to said defendant upon his executing and delivering to plaintiff a proper conveyance of said premises according to the terms of said contract.

WHEREFORE plaintiff prays that defendant be required to receive the said sum so brought into court, and to specifically perform the said contract on his part, by executing and delivering to the plaintiff a warranty deed of the said premises, and that the plaintiff have such further relief as may be equitable, and the costs of this action.

1599. By creditor, for performance of agreement to give a chattel mortgage.

I. That on the .... day of ....., 19.., the plaintiff and defendant entered into an agreement whereby the plaintiff, then being the owner of [*designate the goods, or if numerous, attach schedule*] agreed to sell and deliver the same to the defendant; in consideration whereof the de endant promised to pay him ..... dollars cash upon the delivery of said goods and ..... dollars, ... months from the date of said delivery, and to give on the delivery of such goods a chattel mortgage thereon to the plaintiff, to secure the payment of said ..... dollars.

II. That pursuant to said contract the plaintiff, on the .... day of ....., 19.., delivered said goods to the defendant, who is now in possession thereof, and who paid him the sum of ..... dollars, but failed to deliver to him a chattel mortgage thereon, pursuant to said agreement; and although afterwards, on the .... day of ....., 19.., requested to deliver such chattel mortgage to plaintiff, he refused so to do.

WHEREFORE the plaintiff demands judgment that the defendant execute and deliver to the plaintiff a chattel mortgage on said goods, pursuant to said contract; and that the plaintiff have such further relief as may be just, with the costs of this action.

1600. By lessee for specific performance of an agreement to lease real estate.

I. That on the .... day of ....., 19.., the defendant was and still is the owner of the following described premises [*insert description*] and that on said day the plaintiff and defendant entered into a written agreement whereby the said defendant agreed to lease said premises to the plaintiff for the term of .... years from ....., 19.., at the annual rental to be paid by plaintiff of the sum of ..... dollars, to be paid on the .... day of ..... in each year [*or attach copy of the lease as an exhibit to complaint*].

II. That in reliance upon said agreement the plaintiff on or about the .... day of ....., 19.., repaired and improved the dwelling house upon said premises at an expense of ..... dollars [*or state other acts done in reliance upon the agreement in accordance with the facts*].

III. That plaintiff has duly performed all the conditions of said agreement on his part to be performed, and has always been and now is ready and willing to accept a lease of said premises, and on the .... day of ....., 19.., duly tendered to the defendant the rent of said premises for the first year, and requested that defendant execute a lease thereof according to the terms of said agreement, but that defendant refused and still refuses to make such agreement.

IV. That by reason of the premises, the plaintiff has no adequate remedy at law for the breach of said agreement by the defendant.

WHEREFORE plaintiff demands judgment that the said defendant be required to specifically perform said agreement and execute and deliver the said lease, and that plaintiff have such further relief as may be equitable, and for the costs of this action.

1601. For specific performance of an agreement to execute a chattel mortgage on personal property, and to set aside fraudulent disposition of the property (adapted from St. John v. Griffith, 2 Abb. Pr. 198).

I. That on the .... day of ....., 19.., the plaintiff being the owner of the following described property [*describe property*] on said day entered into an agreement with the defendant C.... D.... whereby said plaintiff agreed to sell and deliver the same to the defendant C.... D.... for the sum of ..... dollars, one-half of which said C.... D.... agreed to pay on the delivery of said property, and the remainder in .... months from the date thereof, and to give a mortgage on said property to the plaintiff to secure the payment of said sum of ..... dollars.

II. That in pursuance of said contract the plaintiff on said day delivered said goods to the defendant C.... D.... and received from him the sum of ..... dollars, being one-half of the price thereof, but said defendant did not deliver to plaintiff a mortgage upon said goods to secure the amount remaining unpaid thereon, as provided in said agreement.

III. That on the .... day of ....., 19.., the plaintiff requested the defendant C.... D.... to execute and deliver said mortgage to the plaintiff, which he then refused to do, and still refuses.

IV. That on the .... day of ....., 19.., the defendant C.... D.... with intent to defraud the plaintiff and deprive him of his security, made, executed and delivered to the defendant E.... F.... without consideration, a chattel mortgage in form covering the said property, and that the said E.... F.... then and there knew of the said agreement between the plaintiff and the defendant C.... D.... and accepted said mortgage with intent to assist said C.... D.... in defrauding the plaintiff, and that the said E.... F.... has caused said mortgage to be duly filed in the office

[*state proper office*] and now claims to hold the same as a valid and subsisting lien upon said property [*or state other acts showing inadequacy of the remedy at law*].

WHEREFORE plaintiff demands judgment that the said defendant C.... D.... be required to specifically perform his said agreement, and to execute and deliver to the plaintiff a chattel mortgage upon said property in accordance with said agreement, and that the said mortgage given to the defendant E.... F.... be adjudged fraudulent and void as against the plaintiff and for such other relief as may be equitable, with costs.

1602. To enforce specific performance of an agreement by a railroad to construct a farm crossing.

I. [*Allege corporate character of defendant, as in Chapter XIX.*]

II. That on the .... day of ....., 19.., the defendant had located its railroad across the [*describe premises*] which premises were and still are the farm of the plaintiff, on which he resides, and on said day the plaintiff and defendant entered into an agreement in writing for the right of way of said railroad across said premises, and for a farm crossing, of which a copy is attached hereto, made part of this complaint, and marked Exhibit A.

III. That in pursuance of said agreement the plaintiff on the .... day of ....., 19.., executed and delivered to said defendant a deed of said right of way, but which deed contained no reference to the agreement for a farm crossing.

IV. That on or about the .... day of ....., 19.., the defendant completed the construction of its railroad across said land, but failed to construct a farm crossing over its said railroad, whereby it has been made impossible for the plaintiff to drive his stock across said track, and whereby also one part of plaintiff's said farm has been and is severed from the other part thereof.

V. That on the .... day of ....., 19.., the plaintiff requested the defendant, through its proper officers, to construct such crossing, but it then refused and still refuses to do so.

VI. That the plaintiff is the owner of .... head of cattle [*or state what stock*] which he keeps on said farm, and it is nec-

essary each day to drive said cattle to the pasture across said railroad, but in consequence of the breach of said agreement he is compelled daily to drive his cattle one mile out of a direct route, and has sustained damages in the sum of ..... dollars [*or state other facts showing the inadequacy of the remedy at law*].

WHEREFORE plaintiff demands judgment that the defendant be required to specifically perform its said agreement and construct said crossing, and that the plaintiff recover his damages aforesaid, and have such further relief as may be equitable, with costs.

1603. Outline of complaint for reformation of contract and specific performance thereof as reformed.

I. [*Allege the making of the contract in which the mistake occurred either by stating its legal effect or by attaching a copy and making it a part of the complaint*].

II. [*Allege the mistake describing the same accurately and how it was made whether by error of the receiver or by mutual mistake of the parties, stating what was intended to be expressed*].

III. [*Allege performance by the plaintiff of all the conditions of the contract on his part, or if any are yet to be performed allege readiness and willingness to perform same and if money is to be paid allege readiness to bring the same into court*].

WHEREFORE plaintiff demands judgment reforming said contract [*state how*] and [*here state acts of specific performance to which plaintiff deems himself entitled. See previous complaints in this chapter*].

1604. On an exchange of lands both parties having taken possession.

I. That on the .... day of ....., 19.., the plaintiff and the defendant entered into an agreement in writing, dated that day, of which a copy is hereto attached made a part of this complaint and marked Exhibit A [*or state legal effect of the agreement so as to show the covenants which each party made*].

II. That thereafter, in pursuance of said agreement, the plaintiff and the defendant respectively took possession of the premises so to be conveyed to them, and still severally occupy the same.

III. That the plaintiff duly performed all the conditions of said contract on his part, and, on the said .... day of ....., 19.., tendered to the defendant a warranty deed of said premises so agreed to be conveyed by the plaintiff, with covenants for quiet enjoyment and against incumbrances, duly signed and sealed by the plaintiff, and demanded of him a deed of said premises so agreed to be conveyed by the defendant; but the defendant refused to execute and deliver such to the plaintiff, and still neglects so to do.

WHEREFORE, the plaintiff demands judgment that the defendant be decreed to specifically perform said agreement, and that he receive plaintiff's said deed and convey to the plaintiff said last named premises, pursuant to the said contract; that plaintiff have such other and further relief as may be just, with the costs of this action.

1605. To enforce performance of a contract to transfer corporate stock.

I. [*Allege the making of the contract by which the defendant contracted to transfer the stock to the plaintiff according to its legal effect, or if it be in writing attach a copy*].

II. [*Allege the compliance by the plaintiff with the conditions of the contract on his part to be performed*].

III. That the said shares of stock are of great and rapidly-increasing value, and the same cannot be purchased in open market; that if the defendant does not deliver the same to the plaintiff the plaintiff will suffer great and irremediable loss, for which a judgment in damages will be no adequate compensation.

IV. That the defendant is a person of no adequate pecuniary means to answer a judgment in damages for the breach of the contract and agreement aforesaid.

WHEREFORE the plaintiff demands judgment, that the defendants may be decreed to deliver and transfer to the plaintiff the amount aforesaid of ..... dollars in the shares of the stock of said company; that, in the meantime, and until the final hearing and determination of this action, the defendant E.... F.... may be enjoined from transferring, incumbering, disposing of, or interfering with, any of said shares and that the plaintiff may recover his costs and

disbursements of this action, and for such other and further relief as to the court may seem just.

1606. Outline of complaint by adopted child to compel performance of agreement to give him a specified share of estate.

I. [*Allege the making of the contract or agreement between the deceased and the plaintiff's mother or father by which the plaintiff was surrendered up by his parent or parents to the deceased on the promise of the deceased to rear, educate, and maintain him as a son, and to give him the interest of a son in his estate at his decease*].

II. [*Allege the performance of said agreement so far as it has been performed on both sides; especially showing that the plaintiff has performed all the duties and obligations of a son up to the time of the decease of the testator or intestate*].

III. [*Allege the death of the promisor and the fact that he made no provision whatever for the plaintiff either by will or otherwise*].

IV. [*Set forth the property left by the deceased.*]

WHEREFORE, [*pray judgment for specific performance of the contract*].

1607. To enforce specific performance of contract in relation to mines, compel conveyance of claims, and accounting.

[*See complaint sustained and reported in full in Lawrence vs. Robinson, 4 Colo. 567*].

1608. To enforce a contract for sale on joint account of mining claims to a corporation, to declare a trust in the corporate stock received by defendant therefor and for damages.

[*See complaint reported in full in Chambers vs. Mittnacht, 23 S. Dak. 449; 122 N. W. 434*].

CHAPTER LXVII.

COMPLAINT TO ENFORCE VENDOR'S LIEN.

1609. By vendor against purchaser, and his grantee and judgment creditors, to enforce lien for purchase money.
1610. Vendor against purchaser to enforce vendor's lien.

In most states a vendor of real estate has an equitable right to a lien upon the land sold for unpaid purchase money. It is rather an equitable right to acquire a lien by action than a lien itself. It is defeated by conveyance of the land by the vendee to an innocent purchaser without notice as well as by the acceptance by the vendor of securities upon other property in addition to the vendee's personal obligation. Berger v. Berger, 104 Wis. 282; 80 N. W. 585; Willard v. Reas, 26 Wis. 540; Iowa Code sec. 2924; Kendrick v. Eggleston, 56 Iowa, 128; Bray v. Booker (N. Dak.), 79 N. W. 293. The right is also extended generally to a third person who had advanced all or a part of the purchase money expressly for the purpose. Carey v. Boyle, 53 Wis. 574; 11 N. W. 47. In North and South Dakota these principles are embodied in statutes. N. Dak. Rev. Codes, 1905, secs. 6281–6285; S. Dak. C. C. 1908, secs. 2148–2152.

1609. By vendor against purchaser, and his grantee and judgment creditors, to enforce lien for purchase money.

I. That the plaintiff, being owner in fee [*or otherwise*] of the real property hereinafter described, did on the .... day of ....., 19.., sell the same to the defendant [*naming purchaser*] for the sum of ..... dollars, and thereupon by his deed conveyed the same to the defendant [in fee] which premises are [bounded and] described as follows [*full description, as in deed*].

II. That the said [*purchaser*] has paid the plaintiff ..... dollars, part of said purchase money [*and state what security*

if any was given for the rest, e. g., thus:] and on the .... day of ....., 19.., gave to the plaintiff his promissory note for ..... dollars, the residue thereof, payable on the .... day of ....., 19..; but that no part [of said note or] of the residue of said purchase money has been paid, though on the .... day of ....., 19.., the plaintiff duly demanded the same of said [*purchaser*].

III. That the said [*purchaser's grantee*] purchased of the [*purchaser*] a portion of said premises, with the full knowledge that the said [*purchaser*] had not paid the balance of said purchase-money, and took a conveyance from the said [*purchaser*] to him for the said premises so by him purchased of the said [*purchaser*].

IV. That the said [*judgment creditor*] claims to have recovered judgment against the said [*purchaser*] for about ..... dollars, on the .... day of ....., 19.., in the ..... court, and has caused execution to be issued thereon, and is proceeding to sell the part of said premises not sold to the said [*purchaser's grantee*]; whereby the said plaintiff will wholly lose the balance of the said purchase money, as the said [*purchaser*] is wholly insolvent, and unable to pay the same.

WHEREFORE the plaintiff demands judgment, that the plaintiff be adjudged to have an equitable lien upon said lands for the unpaid purchase price thereof aforesaid, and that such lien be adjudged to be superior to the liens or interests of the defendants in said lands, and that the said defendants be barred and foreclosed of all right, lien or equity of redemption in said lands, and that the same be sold under the direction of this court, and the plaintiff be paid the amount of said lien out of the proceeds of such sale, together with the expenses of such sale and the costs of this action, and that in case of deficiency the plaintiff have judgment against the defendant [*purchaser*] for the amount thereof, and for such further relief as may be equitable.

1610. Vendor against purchaser to enforce vendor's lien.

I and II. [*Same as I and II in last preceding form*].

III. That plaintiff has no security for the payment of

said sum other than his vendor's lien upon said premises, and that the defendant is insolvent.

WHEREFORE plaintiff demands judgment for ..... dollars with interest thereon from ..... 19.., and for a lien for that amount on said premises, and directing a sale of said premises to satisfy said lien and the costs and expenses of this action, and for such other relief as may be just.

CHAPTER LXVIII.

COMPLAINTS TO ENFORCE MECHANICS' LIENS.

1611. Complaint for foreclosure of mechanic's lien; contractor against owner and other lien claimants. (Wisconsin.)
1612. The same, for reasonable value of materials sold or labor furnished to owner. (Wisconsin.)
1613. By employee of principal contractor against owner and principal contractor. (Wisconsin.)
1614. By several employees against principal contractor and owner. (Wisconsin.)
1615. Allegations of assignment of lien. (Wisconsin.)
1616. For foreclosure of mechanic's lien. (Minnesota.)
1617. The same, by employee of principal contractor. (Minnesota.)
1618. The same, for materials furnished to owner. (Minnesota.)
1619. For foreclosure of mechanic's lien, general form. (Iowa.)
1620. For foreclosure of mechanic's lien, general form. (North and South Dakota.)
1621. For foreclosure of mechanic's lien, contractor against owner, general form. (Nebraska.)
1622. The same, where subsequent lien-holders or incumbrancers are joined. (Nebraska.)
1623. By subcontractor against principal contractor and owner. (Nebraska.)
1624. Allegation of fraudulent lien.

Mechanics' liens and actions to enforce them are creatures of the statutes of the various states. While these statutes are quite similar there are many substantial differences in details. In drawing a complaint close attention should be paid to the statute of the particular state, and care should be taken to state clearly every fact made necessary by that statute to the perfecting of a lien prior to action. The various statutes will be found listed in chapter XIII, Note 1.

1611. Complaint for foreclosure of mechanic's lien: contractor against owner and other lien claimants (Wis. Stats. 1913 sec. 3322).

I. That the plaintiff is now and was at the times hereinafter stated a contractor and builder doing business as such at the .... of ..... state of Wisconsin, and that as such

contractor and builder * on or about the .... day of ....., 19.., he entered into an oral [*or* written contract with the defendant [*owner*] whereby he agreed to construct and erect, and furnish all the materials for [*or* to do all the carpenter work and furnish all the materials therefor in and about] the construction and erection of a certain dwelling house for the said defendant [*owner*] upon [*describe premises*] for the sum of ..... dollars to be paid by the said [*owner*] upon the completion of the said building. [*Or*, a true copy of which contract is hereto annexed, made part of this complaint, and marked Exhibit A.]

II. That in pursuance of said contract and in full accordance with the terms thereof the plaintiff, on and between the .... day of ....., 19.., and the .... day of ....., 19.., erected and constructed said building [*or* performed all the carpenter work in the construction of said building] upon the premises aforesaid and furnished all the materials therefor and duly performed all the conditions of said contract on his part to be performed.

III. That the said [*owner*] was at the dates hereinbefore mentioned and still is the owner in fee of the premises hereinbefore mentioned, and that the said premises are [situated within the incorporated city of ..... in said state and do not exceed one acre in extent] [*or*, not situated within the limits of any incorporated city or village, and do not exceed forty acres in extent.] [*Wis. Stats. 1913 sec. 3314 subd.* 7.]

IV. That the last date upon which said work and labor of constructing said building was performed, and said materials were furnished is the .... day of ....., 19.., and that said plaintiff duly filed, as required by law, his claim for a lien for the amount due and owing him as aforesaid from said defendant, in the office of the clerk of the circuit court of the county of ..... on the .... day of ....., 19.., and within six months from the time of the doing of said work, and the furnishing of the building materials aforesaid, which claim for a lien so filed was duly signed by the claimant [*or* by L.... M.... the attorney of the claimant] and contained a statement of the contract or demand on which it is founded, the name of the person against whom the demand is claimed, the name of the claimant or assignee, the last date of the performance of labor or furnishing of materials, a description of the property affected thereby,

a statement of the amount claimed, and all other material facts in relation thereto, a copy of which claim is hereto annexed and made part of this complaint, and marked Exhibit B.

V. That one year has not elapsed since the doing of said work and labor, and furnishing of the building materials aforesaid, and the commencement of this action; that no part of the contract price has been paid except the sum of ..... dollars; that there is now due to and owing the plaintiff from said defendant on account of said contract, and the performance of said labor and furnishing of said materials, the sum of ..... dollars, with interest from the .... day of ....., 19..

VI. That the defendant [*other lien claimant*] has filed a claim for a lien upon the premises aforesaid, for the amount of ..... dollars and costs, which claim was filed in the office of the clerk of the circuit court for the county of ..... aforesaid on the .... day of ....., 19.., for [*state whether for materials or labor*] and that no other claim for liens on said premises have been filed.

VII. That the defendants [*subsequent purchasers, or lien holders*] have or claim to have some interest in or lien upon the said premises, which interest or lien, if any, is subsequent and subject to the lien of the plaintiff.

VIII. That the relation of landlord and tenant did not exist between the plaintiff and the defendants or either of them at any of the times hereinbefore mentioned.

WHEREFORE plaintiff demands judgment that the demands of all persons having filed claims for liens upon the premises aforesaid, whether plaintiffs or defendants, be ascertained and adjudged, and that the interest of [*owner*] the person owning said premises at the time of the commencement of the work and furnishing of the materials aforesaid upon the premises hereinbefore described, of, in and to the premises aforesaid, or the interest therein which said [*owner*] or any person claiming under him has since acquired, be sold to satisfy the amount of the liens so ascertained and adjudged, with the costs of this action, and that in case of deficiency arising upon such sale then that upon confirmation thereof the plaintiff recover judgment for such deficiency against [*defendants personally*

liable] and have execution therefor, and for such further relief as may be just and equitable.

1612. The same, for reasonable value of materials sold or labor furnished to owner (Wisconsin).

I. [*As in last preceding form to the* *] on and between the .... day of ....., 19.., and the .... day of ....., 19.., at the special instance and request of the defendant [*owner*] and upon his promise to pay the reasonable value thereof, the plaintiff performed work and labor and furnished certain lumber and other building materials to the defendant in and about the erection, construction and repair of a certain dwelling house owned by the said defendant [*owner*] and situated upon the following described premises [*insert description*] which labor and materials were of the reasonable value of ..... dollars, a true statement and account of which labor and materials so performed and furnished is hereto attached, made part of this compalaint, and marked Exhibit A.

[*Omit paragraph II of the preceding form, and proceed thereafter as in said form, making such incidental changes as may be necessary.*]

1613. By employee of principal contractor against owner and principal contractor (Wis. Stats. 1913 secs. 3315–3322).

I. That on or about the .... day of ....., 19.., the defendants [*owner and principal contractor*] entered into a certain contract whereby the said [*principal contractor*] agreed to construct [*set forth contract as in allegation I of Form 1611*].

II. [*Allege performance of contract by principal contractor as in allegation II of Form 1611.*]

III. [*As in allegation III of Form 1611.*]

IV. That the plaintiff is a carpenter, and on or about the .... day of ....., 19.., the said defendant [*principal contractor*] employed the plaintiff to perform work, labor and services as such carpenter, in, and upon the building and construction of said dwelling house, and agreed to pay the plaintiff at the rate of ..... dollars per day for such labor, and that under said agreement the plaintiff performed

work and labor as carpenter in and about the erection and construction of said building on and between the .... day of ....., 19.., and the .... day of ....., 19.., for .... days, whereby the said [*principal contractor*] became indebted to the plaintiff in the sum of ..... dollars, which sum has not been paid, nor any part thereof, and still remains justly due to the plaintiff.

V. That the last date of the performance of the said work and labor upon said building by the plaintiff under his said employment is the .... day of ....., 19..

VI. That on the .... day of ....., 19.., the plaintiff gave notice in writing to the said defendant [*owner*] the owner of the property to be affected by such lien, setting forth therein that he, the plaintiff, had been employed by said defendant [*principal contractor*] to perform work and labor upon, in and about the construction of such building, and had, as such carpenter, actually performed work, labor and services thereon for the period of .... days, at the agreed price of ..... dollars per day; that the same had been performed in and between the .... day of ....., and the .... day of ....., in the year 19.., and that the amount due to the plaintiff was the sum of ..... dollars, and that the plaintiff claimed the lien therefor given by Chapter 143 of the Wisconsin Statutes for the year 1913, and the acts amendatory thereof; and that such notice was given by delivering the same to said defendant [*owner*] personally and leaving the same with him [*or* by filing the said notice in the office of the clerk of the circuit court of said county of ..... and that neither said (*owner*) nor his agent could be found in said county].

VII. That thereafter and on the .... day of ....., 19.., and within six months from the date of the last charge for performing said work and labor, the plaintiff duly filed as required by law, his claim for a lien upon said building and said lot above described, in the office of the clerk of the circuit court of ..... county, containing a statement of the contract and demand upon which it is founded, and the name of the person against whom the demand is claimed, the name of this claimant, the last date of the performance of labor, as above stated, a description of the property affected thereby, a statement of the amount claimed, and all other material facts in relation thereto, a copy of which claim is

attached hereto and made part of this complaint, and marked Exhibit A; and that one year has not elapsed since the date of the last charge for work and labor as aforesaid.

VIII. That no other claims for liens on said premises have been filed [*or allege the filing of other claims as in allegation VI of Form 1611.*]

IX and X. [*As in allegations VII and VIII of Form 1611.*]

WHEREFORE [*demand for judgment as in Form 1611.*]

1614. By several employees against principal contractor and owner (Wis. Stats. 1913 sec. 3321).

I, II and III. [*As in Form 1613.*]

IV. That on or about the .... day of ....., 19.., the plaintiffs were severally employed by the defendant [*principal contractor*] to perform work and labor in and about the construction of said building, and that each of said plaintiffs did thereafter perform such labor as hereinafter particularly alleged, and that the facts relative to the claim of the plaintiff A.... B.... are as follows:

V. [*Here state facts as to claim of A.... B.... as in allegations IV, V, VI and VII of Form 1613.*]

VI. That the facts relative to the claim of the plaintiff C.... D.... are as follows [*state the facts, as in case of A.... B....*]

VII. [*Follow allegations VIII, IX and X of Form 1613.*]

VIII. That the allegations of this complaint relative to each plaintiff's claim and cause of action herein are made by him upon his personal knowledge; and as to the other allegations thereof, he makes the same upon information and belief.

WHEREFORE, etc. [*as in Form 1611.*]

[*To be verified by all plaintiffs, as they are not joined in interest.*]

1615. Allegations of assignment of lien (Wis. Stats. 1913 sec. 3316).

That the said [*original claimant*] on or about the .... day of ....., 19.., and before the commencement of this action, duly assigned and transferred to the plaintiff all his right, title and interest in or to the said claim for the said work, labor and materials, and in and to the said lien upon said

premises; and the said plaintiff now is the lawful owner and holder thereof.

That on the .... day of ....., 19.., and within fifteen days after said assignment was made, this plaintiff gave to said defendant [*owner*] notice in writing of such assignment, by serving such notice in writing, together with a copy of such assignment on him personally on that day, and leaving the same with him.

1616. For foreclosure of mechanic's lien; contractor against owner, general form (Minn. Gen. Stats. 1913 sec. 7028).

I. That the plaintiff is and was at the dates hereinafter mentioned a contractor and builder, and that on or about the .... day of ....., 19.., plaintiff and defendant [*owner*] entered into a contract whereby the plaintiff agreed to construct a dwelling house for said defendant upon the premises hereinafter described and furnish all materials therefor, and the defendant [*owner*] agreed to pay plaintiff upon completion thereof the sum of ..... dollars [a copy of which agreement is hereto attached, made part of this complaint, and marked Exhibit A].

II. That the plaintiff has constructed said dwelling house in accordance with said contract, and has duly performed all the conditions of said contract on his part to be performed.

III. That the premises upon which said dwelling house was built by the plaintiff under said contract are described as follows [*insert accurate description*].

IV. That at the time of the making of said contract the defendant [*owner*] was and still is the owner in fee of said premises.

V. That the defendant [*owner*] has failed and neglected to pay the plaintiff any part of the contract price of said dwelling house, except the sum of ..... dollars paid on the .... day of ....., 19.., and that there is now due and owing the plaintiff from the defendant the sum of ..... dollars with interest from ....., 19..

VI. That the plaintiff began to furnish materials and perform labor in the erection and construction of said dwelling house under the terms of said agreement on the

.... day of ....., 19.., and thereafter continued to perform labor and furnish materials therefor until and including the .... day of ....., 19.., on which day said building was completed, and that a true bill of particulars of all of said materials and labor is hereto attached, made part of this complaint, and marked Exhibit A.

VII. That on the .... day of ....., 19.., and within ninety days after the last item of said labor and materials was so performed, furnished and delivered, the plaintiff filed for record, in the office of the register of deeds in and for the county of ..... state of Minnesota, a verified lien statement, a copy of which is hereto attached, marked Exhibit B, and made part of this complaint.

VIII. That the defendants W.... X.... and Y.... Z.... have lien claims of record upon said premises for materials furnished for or labor performed upon said dwelling house.

WHEREFORE plaintiff demands judgment against the defendant [*owner*] for the sum of ..... dollars, with interest thereon from the .... day of ....., 19.., and adjudging the same a lien upon said premises; also determining and adjudging the amount and validity of the lien claims of defendants [*other lien claimants*] and adjudging and directing a sale of said premises and the application of the proceeds thereof to the payment of the claims herein adjudged liens thereon, and the costs and disbursements of this action; and for such further relief as may be just and equitable.

1617. The same, by employee of principal contractor (Minnesota).

I. That on or about the .... day of ....., 19.., the defendants [*principal contractor and owner*] entered into a contract whereby [*allege contract as in allegation I of Form 1616*].

II. That between and including the .... day of ....., 19.., and the .... day of ....., 19.., the plaintiff, at the special instance and request of the defendant [*principal contractor*] and upon his promise to pay therefor the sum of ..... dollars per day [*or* its reasonable value] performed for the said defendant [*principal contractor*] work, labor and services in and about the erection and construction of said

building, and in accordance with the said agreement between the defendants [*principal contractor and owner*] the nature, amount and value of which are specifically set forth in the bill of particulars attached hereto and made part of this complaint, and marked Exhibit A.

III. That the amount of the said work, labor and services so performed by plaintiff [*or*, the reasonable value of said work, labor and services] is the sum of ..... dollars, no part of which sum has been paid except the sum of ..... dollars.

IV. That said work, labor and services were performed in and about the erection and construction of the said dwelling house upon the following described premises [*insert description*] and that at the time the said work, labor and services were performed the said [*owner*] was and still is the owner in fee of said premises.

V and VI. [*As in allegations VII and VIII of last preceding form.*]

WHEREFORE [*demand for judgment as in last preceding form.*]

1618. The same, for materials furnished to owner (Minnesota).

I. That on and between the .... day of ....., 19.., and the .... day of ....., 19.., the plaintiff sold and delivered to the defendant certain building materials, the nature, quality and value of which are specifically set forth in the bill of particulars hereto attached, marked Exhibit A, and made a part of this complaint.

II. That said materials were reasonably worth ..... dollars [*or*, that said defendant then promised to pay for the same ..... dollars on or before the .... day of ....., 19..]

III. That no part thereof has been paid [except, etc.]

IV. That said materials were so sold and delivered to be used, and were in fact used in the construction of a dwelling house upon the following described premises [*insert description*] and that at the time said materials were so sold and delivered the defendant was and still is the owner in fee of the said premises.

V and VI. [*As in allegations VII and VIII of Form 1616.*]

WHEREFORE [*demand for judgment as in Form 1616.*]

1619. For foreclosure of mechanic's lien, general form (Iowa Ann. Code 1897 sec. 3089 et seq.).

[*In Iowa either of the last preceding forms given for use in Minnesota may be substantially followed, substituting for the allegation as to the filing of the claim the following*]:

That on the .... day of ....., 19.., the plaintiff duly filed in the office of the clerk of the district court of ..... county, Iowa, a duly verified statement and account of the said demand due to the plaintiff, after allowing all credits thereon, which statement set forth the time when such materials were furnished [*or*, such labor was performed, *or both*] and when the same was completed and contained a correct description of the said real estate to be charged with such lien, a true copy of which verified statement is hereto attached, made part of this petition, and marked Exhibit A [*add if the plaintiff be a subcontractor*] and that on the .... day of ....., 19.., the plaintiff duly served upon the defendant [*owner*] [*or*, upon L.... M.... the agent of said *owner*] a written notice subscribed by the plaintiff, of the filing of the plaintiff's said claim and statement as aforesaid, by delivering such notice to and leaving the same with the said [*owner or agent*], a true copy of which notice so served is attached hereto, and made a part of this petition, and marked Exhibit B.

[*Allege assignment, if any, as in Form 1615.*]

WHEREFORE the plaintiff demands judgment against said defendant [*owner*] for the said sum of ..... dollars with interest and costs, and prays that his mechanic's lien be established and enforced against the building and land aforesaid, as provided by law; that the lien, if any, of each and all of the defendants in this action to the real estate above described be decreed to be junior and inferior to the plaintiff's said lien thereon, and that the equity of redemption of each and all of said defendants be forever barred and foreclosed, and that special execution issue for the sale of said premises, or so much thereof as may be necessary to satisfy said judgment, interests and costs, and for such other relief as may be equitable in the premises.

1620. For foreclosure of mechanic's lien, general form (N. Dak. Codes 1905 sec. 6237 et seq.; S. Dak. C. C. P. 1908, sec 696 et seq.).

[*In the states of North and South Dakota the forms previously given in this chapter for use in Minnesota may be substantially followed, substituting for the allegation of the filing of the statement of lien the following*]:

That on the .... day of ....., 19.., and within ninety days [*in South Dakota*, four months] after the furnishing of all of the said materials [*or* the performing of said labor, *or both*] the plaintiff duly filed in the office of the clerk of the..... court of the county of ..... in said state a just and true account of the demand so due to the said plaintiff, after allowing all credits thereon, which account contained a correct description of the said real estate to be charged with such lien, and was duly verified by the affidavit of this plaintiff.

WHEREFORE the plaintiff demands judgment against the defendant [*owner or principal contractor*] for the sum of ..... dollars, with interest from ....., 19.., and for the costs of filing his said claim, as well as the costs of this action, and that the same, be adjudged to be a lien upon the said real estate and dwelling house herein described, and upon all the right, title and interest of the said [*owner*] therein; that the rights and interests of the defendants [*all other lien claimants or incumbrancers*] be ascertained and determined [and that the same be adjudged to be subject to the plaintiff's said lien]; that the said premises and dwelling house be adjudged to be sold, and that the proceeds be applied to the payment of the plaintiff's said demand and costs, as well as to the payment of the other liens which may be ascertained and adjudged herein [*in North Dakota omit prayer for personal judgment at beginning, and insert:* and that the plaintiff have judgment for any deficiency which may arise upon such sale against the defendant, *the owner*]; and that the plaintiff have such other and further relief as may be just and equitable.

1621. For foreclosure of mechanic's lien, contractor against owner, general form (Neb. R. S. 1913 sec. 3823 et seq.).

I. That on or about the .... day of ....., 19.., the plaintiff entered into an oral [*or* written] contract with the

defendant [*owner*] to furnish him fifty thousand brick, at ..... dollars per thousand, for the construction and erection of a dwelling house, a copy of which contract is attached hereto, made part of this petition, and marked Exhibit A.

II. That the plaintiff furnished and delivered said brick to the defendant for the erection of said house, on and between the .... day of ....., 19.., and the .... day of ....., 19.., and that there is now due to the plaintiff therefor the sum of ..... dollars, no part of which sum has been paid.

III. That the defendant [*owner*] at the time the plaintiff furnished said brick was the owner in fee of said lot. [*Or otherwise state defendant's title.*]

IV. That on the .... day of ....., 19.., and within four months from the time of furnishing said materials, the plaintiff made an account in writing of the items of such materials furnished the defendant under said contract, and after making oath thereto as required by law, filed the same in the office of the register of deeds of ..... county, and claiming a mechanic's lien therefor upon said lot and the building thereon.

WHEREFORE the plaintiff demands judgment against the defendant [*owner*] for the sum of ..... dollars, with interest from the .... day of ....., 19.., and costs of suit, and that said premises may be sold, and the proceeds thereof applied to the payment of said judgment, interest and costs, and for such other and further relief as may be just and equitable.

1622. The same, where subsequent lien-holders or incumbrancers are joined (Nebraska).

[*Insert in the preceding form the following*]:

V. Upon information and belief, that the defendant [*other lien claimant*] has or claims to have a mechanic's lien upon said premises for the sum of ..... dollars, filed on the .... day of ....., 19.., and that on the .... day of ....., 19.., the said defendant [*owner*] made and executed a mortgage upon said premises to the defendant [*subsequent mortgagee*] to secure the payment of .....dollars, which mortgage is subsequent and subject to the lien of the plaintiff.

[*Add to the prayer for judgment*]: that the interests or liens,

if any, of the defendants [*subsequent lien-holders or mortgagors*] be adjudged to be subsequent and subject to the lien of the plaintiff, etc.

1623. By subcontractor against principal contractor and owner (Nebraska).

I. That on the .... day of ....., 19.., the defendant [*owner*] was the owner of certain real estate described as follows [*describe in full*] in ..... county, and on said day said [*owner*] entered into a contract with defendant [*principal contractor*] to erect a building on said land, a copy of which contract is attached hereto and marked Exhibit A [*or state contract according to legal effect*].

II. That on the .... day of ....., 19.., the said [*principal contractor*] employed the plaintiff to work on said building for the sum of ..... dollars per day, and he thereupon performed .... days' labor thereon, in pursuance of said employment, the last day of said labor being the .... day of ....., ..., 19..

III That on the .... day of ....., 19.., and within sixty days from the date of the performance of said labor, the plaintiff notified said [*owner*] of the amount owing to him by said [*principal contractor*] and requested him to pay the same, which he has failed to do. That thereupon on said day the plaintiff made an account in writing of the items of said labor performed for said [*principal contractor*] on said building under said contract, and after making oath thereto, as required by law, filed the same in the office of the register of deeds of ..... county, claiming a mechanic's lien therefor upon said lot and the building thereon.

IV. That no part of said debt has been paid either by the said [*principal contractor*] or the said [*owner*] and there is now due and owing by said defendants to the plaintiff the sum of ..... dollars, with interest from the .... day of ....., 19..

WHEREFORE the plaintiff demands judgment against the defendants for the sum of ..... dollars with interest from the .... day of ....., 19.., and costs of suit, and that said premises may be sold and the proceeds applied to the payment of said judgment, interests and costs; and for such other relief as may be just and equitable.

1624. Allegation of fraudulent lien.

[*Insert in any of the foregoing forms, if the facts warrant, and it is desired to obtain a judgment setting aside the fraudulent lien*]:

That on the ....day of ....., 19.., the defendant [*fraudulent lien-holder*] at the instance and request of the defendant [*owner*] and with intent to defraud the plaintiff, filed a claim for lien against said [*owner*] and upon said premises for the sum of ..... dollars. That said claim is fraudulent and void, and that said defendant [*owner*] is not indebted to said E.... F.... in any way whatever for labor, skill or materials furnished by him for the erection [*or* repair] of said dwelling house, and said [*fraudulent lien-holder*] has no valid lien thereon and that said lien, if permitted to remain in force, will greatly diminish or wholly defeat the lien of the plaintiff.

[*Add to demand for judgment*]: That said apparent lien of said defendant E.... F.... may be declared fraudulent and void, and set aside, etc.

CHAPTER LXIX.

COMPLAINTS FOR PARTITION.

1625. Complaint for partition, general form.
1626. Allegation of unknown owners.
1627. Allegation of dower interest.
1628. Allegation of judgment lien on undivided share.
1629. Allegation of mortgage lien on undivided share.
1630. Allegation of receipt of rents and profits by co-tenants.
1631. Complaint for partition, setting forth source of title.
1632. Petition for partition. (Iowa.)
1633. Complaint in action for partition of a water power. (Wisconsin.)
1634. Petition in partition proceedings. (Iowa.)

The action of partition is statutory and the statutes of the various states differ somewhat in details. Generally, however, it may be said that partition actions are simply proceedings of an equitable nature brought by one joint tenant in common who is in possession, actual or constructive, of lands, against his co-tenants to obtain division of the lands or a sale and division of the proceeds in case the property can not be divided without great prejudice to the interests of the owners. All parties having interests or liens upon the premises, or upon the share of any tenant, should be made parties to the action. The complaint should describe the lands sought to be divided, and state specifically the interest which each party plaintiff and defendant has in them, and pray for partition. It is not an action in which disputed titles are to be settled, and if it appear that title is in dispute between plaintiff and defendant, the action will either be dismissed without prejudice, or stayed until the plaintiff establish his title at law. Deery v. McClintock, 31 Wis. 195; Seymour v. Ricketts, 21 Neb. 240; 31 N. W. 781.

In some states it seems that the action may be brought by any owner or claimant of any real estate or of any interest therein. Ariz. R. S. 1913 sec. 1567; Ark. Dig. of Stats. 1904 sec. 5770; Tex. Civ. Stats. Ann. 1913 art. 6096.

In Wisconsin such action may be maintained by any person who has any estate in the lands of which partition is sought, and whenever any person shall have a life estate and be in possession of real estate, any partition action brought by or against any person having an estate in remainder or reversion shall be subject to such life estate. Wis. Stats. 1913 sec. 3101.

In Minnesota and Oregon it seems that the action may be brought not only by a tenant in possession but also by a remainderman not in possession or entitled to present possession. Minn. Gen. Stats. 1913 sec. 8028; Cook v. Webb, 19 Minn. 167; Ore. Laws, 1910 sec. 435.

The statutes of many states in terms authorize the action to be brought only by tenants in possession: Cal. C. C. P. 1906 sec. 752; Colo. Stats. Ann. 1911 sec. 4745; Idaho Rev. Codes 1908 sec. 4560; Montana Rev. Codes 1907 sec. 6883; North Dakota Rev. Codes 1905, sec. 7404; S. Dak. C. C. P. 1908 sec. 587; Utah Comp. Laws 1907 sec. 3522; Wash. Rem. and Bal. Code 1910 sec. 838; Wyo. Comp. Stats. 1910 sec. 4941. In Iowa, Kansas, Nebraska and Oklahoma the action is governed by the following statutes: Iowa Ann. Code 1897 secs. 4240 *et seq.;* Kans. Gen. Stats. 1909 sec. 6230, *et seq.;* Nebraska R. S. 1913 sec. 8285 *et seq.;* Okla. Comp. Laws 1909 sec. 6135 *et seq.*

1625. Complaint for partition, general form.

I. That the plaintiff and the defendants, own and possess as joint tenants [*or*, as tenants in common] the following described premises [*particular description of the premises*]; and that the plaintiff is desirous of a partition of the same.

II. That the plaintiff has an estate of inheritance therein of one undivided one-third interest in the fee thereof [*or other estate*].

III. That each of the defendants [*co-tenants*] have a similar estate of one undivided one-third interest in the same [*or otherwise*].

IV. That the above described lands are all the lands in this state in which the parties to this action own any estate either jointly or in common, and that as plaintiff is informed

and believes, no other persons have any interest or estate in the lands hereinbefore described.[1]

WHEREFORE the plaintiff demands judgment for a partition of the said premises, according to the respective rights of the parties interested therein, and for a sale thereof, if it shall appear that a partition thereof can not be made without great prejudice to the owners thereof, and that the proceeds of such sale may be brought into court and divided among the parties, according to their respective rights and interests, and for the costs of this action; and for such further relief as may be equitable.

1626. Allegation of unknown owners.

That one M.... N.... in his lifetime, had an estate of inheritance therein of one undivided one-fourth interest in the fee [*or otherwise*] and that the said M.... N.... several years since removed from this state to .....; that he subsequently married and had children, some of whom are now living; but their names and places of residence are wholly unknown to the plaintiff, and although he has made diligent inquiries for that purpose, he cannot ascertain the same, or either of them. That said M.... N.... and his said wife are now dead; and that the children and heirs, or the heirs at law of any who may be dead, are collectively entitled to the undivided one-fourth part of said premises to which the said M.... N.... would be entitled, if living.

1627. Allegation of dower interest.

That the defendant [*dowress*] is the widow of one X.... Y...., the father of the said [*co-tenants*] from whom they inherited said premises; and, as such widow, claims a right of dower which has not been admeasured in [the following described part of] said premises.

1628. Allegation of judgment lien on undivided share.

That the defendant [*judgment creditor*] holds a judgment recovered by him [*or*, by one M.... N.... and thereafter duly

[1] By Wis. Stats. 1913 sec. 3102, if the complaint does not ask partition of all the lands owned by the parties either of them may have the complaint so amended as to affect all the lands so owned.

assigned to him], duly given in the ..... court [*or*, in an action before O.... P.... justice of the peace in and for the town of .....] on or about the .... day of ....., 19.., against [*one or more of the co-tenants*] for the sum of ..... dollars; which judgment was, on the .... day of ....., 19.., docketed in said county of [*county where the premises are situated*] and remains unpaid and unsatisfied of record.

1629. Allegation of mortgage lien on undivided share.

That the defendant [*mortgagee*] holds a mortgage upon the said interest of [*one of the co-tenants*] for ..... dollars, payable on the .... day of ....., 19.., with interest from the .... day of ....., 19..

1630. Allegation of receipt of rents and profits by co-tenants.

That during the time this plaintiff and said defendants have owned the said premises jointly [*or*, in common] to-wit, since the .... day of ....., 19.., the defendant E.... F.... has received all of the rents and profits thereof, amounting to the sum of ..... dollars, as the plaintiff is informed and believes, and that on the .... day of ....., 19.., the plaintiff requested the said E.... F.... to account to him [this plaintiff] for the rents and profits so received and pay the said plaintiff his proper share thereof, which the said E.... F.... refused to do.

[*Add to prayer for judgment in first form in this chapter*]: and that the defendant E.... F.... be required to account for and pay over to the plaintiff the rents and profits aforesaid, so wrongfully retained by him, etc.

1631. Complaint for partition, setting forth sources of title.

I. That on or about the .... day of ....., 19.., C.... B...., being the owner in fee of the real property hereinafter described, died intestate as to the same, which real property is described as follows [*give description*].

II. That said C.... B.... left W.... B...., his widow, one of the defendants, who is entitled to dower in said premises.

III. That subject to said dower the premises descended to the following named persons, the only heirs of the said deceased:

(1) The plaintiff, A.... B...., who is a son of said C.... B.... deceased;

(2) The defendant E.... B...., a daughter of the said C.... B...., deceased, and wife of one L.... B.... of ..... county, in the state of .....

(3) The defendants F.... M.... and G.... M...., minor children of one F.... B...., a daughter of said C.... B...., deceased. The said F.... B.... intermarried with the defendant H.... M...., and afterwards died intestate, leaving issue of said marriage F.... M.... and G.... M...., her only children and heirs, who reside in the county of ..... and for whom their father H.... M...., who resides in ..... county, has been duly appointed guardian by the ..... court of said ..... county. The said H.... M.... is tenant by the curtesy of the estate of said children.

(4) G.... B...., son and only heir of one H.... B...., deceased. The said H.... B.... was a son of said C.... B...., deceased. The said G.... B...., after said estate was cast upon him by descent as aforesaid, conveyed his estate in said premises, by deed duly executed, to the defendant X.... Y.... who resides in .....

IV. The parties above named have now the following undivided estate in said premises:

(1) The plaintiff, one undivided fourth in fee;

(2) The defendant E.... B...., one undivided fourth in fee;

(3) The defendants F.... M.... and G.... M...., each one undivided eighth in fee, subject to the curtesy of their father, H.... M....

(4) The defendant X.... Y...., one undivided fourth in fee.

V. [*Add such further allegations as to liens, and judgments, or otherwise, from the forms previously given in this chapter, as the facts may call for.*]

WHEREFORE [*demand for judgment as in Form 1625*].

1632. Petition for partition (Iowa).

[*In Iowa an abstract of title must be attached to the petition. hence the following allegation should be inserted in the foregoing forms:*]

The plaintiff attaches to this petition an abstract of the title relied upon by him, marked Exhibit A, and made a part thereof.

[*It is the opinion of Mr. Kinne that under Iowa Ann. Code 1897 sec. 4185 it is advisable to state in the petition, when there are no parties under legal disability, that the parties are unable to agree upon a division of the property. 2 Kinne's Pl. Pr. p. 418. If deemed necessary, this fact may be alleged as follows*]:

That the several owners of said lands are unable to agree upon a division thereof.

1633. Complaint in action for partition of a water power (Wis. Stats. 1913 sec. 3149; condensed and adapted from precedent sustained in Clark v. Stewart, 56 Wis. 154; 14 N. W. 54).

I. That by Chapter .... of the private and local laws of Wisconsin for the year 19.., power and authority was duly given to [*name grantees*] to erect and maintain a dam across the ..... river, at [*name place*] upon certain lands described as follows [*describe tracts on which dam rests*], which lands were th n owned by [*name owners*].

II. That in pursuance of the power so granted, a dam with booms and piers was erected at said point in the year 19.., by means whereof a valuable water power was created which has ever since been used and enjoyed as hereinafter set forth.

III. That subsequently, by proper conveyances from said original owners the plaintiff and defendants became the owners in severalty, and entered into possession of the tracts of land upon which said dam is constructed, to-wit: the plaintiff owns and possesses [*here describe tract owned by*

plaintiff]; the defendant C.... D.... owns and possesses [*describe tract*]; and the defendant E.... F.... owns and possesses, etc.

IV. That by sufficient and proper conveyances from said original grantors and their grantees, the plaintiff and the said defendants have become the owners of and are now possessed of said dam and of the entire water power produced by said dam, and the rights and privileges granted by said act of the legislature, as follows, to-wit:

The plaintiff acquired and now possesses the right to use forever from said dam and water power sufficient water to drive one rotary saw and edger, one bull wheel, and to carry off from the pond the refuse floodwood that might accumulate, and an equal *pro rata* right to use the piers, booms, ponds, guardlocks, and dams, with other mills then or thereafter erected [*or otherwise describe the right according to the terms of the conveyance*].

The defendant C.... D.... acquired and now possesses the right [*here describe his right according to his conveyance, and so proceed with each separate right*].

V. That the plaintiff and defendants have severally erected mills below said dam, for the use of said water power and privileges, and that since the erection thereof great changes have taken place in the kind of water wheels used, requiring an increased quantity of water to propel the machinery; that the terms of said grants to the various parties, as above set forth, do not admit of accurate measurement of the water which may be used by each except by actual trial; that in times of low water, in the usual condition of the dams and locks, there is not sufficient water to run all of said mills to their full capacity; that during the present season there has at times been a scarcity of water; that the mills of said defendants C.... D.... and E.... F.... are located below the mills of the plaintiff on said river; so that when the water was low they have drawn down the head at the plaintiff's mill, thus making it impossible for the plaintiff to obtain water to which he is lawfully entitled as hereinbefore set forth, to the great damage of the plaintiff; that said defendants [*name them*] insist upon their right to run their mills aforesaid to the full capacity thereof night and day, notwithstanding it may take the plaintiff's water away from him, and that they intend and threaten to do so in violation

of the plaintiff's rights in the premises; nd that disagreements have arisen and still exist between the plaintiff and said defendants respecting their rights in said dam and said water power and respecting their obligations to repair said dam, booms and piers, by reason of the general terms used in conveying their respective rights and privileges.

VI. That the said dams, piers, and booms connected with said water power are now in need of repair and improvement; that it is essential to the preservation and proper use of said power that the same be repaired without delay; and that the parties are unable to agree as to their respective obligations to contribute to the expense of repairing said dam, and the care and management thereof.

WHEREFORE the plaintiff demands that the respective rights of the said parties in said water power be determined and adjudged, and that the actual quantity to which each is entitled under a given head may be ascertained and adjudged in the manner provided by law; that the respective obligations of the parties to contribute to the expense of repairs and maintenance of said dam be adjudged, and that the parties defendant may be restrained from using more than their just proportion, and from drawing down the water of said pond, or so much water therefrom as to prevent the plaintiff from the use and enjoyment of his due share thereof, and that the plaintiff have such further relief as may be just and equitable, and that he recover the costs and disbursements of this action.

1634. Petition in partition proceedings (Iowa Ann. Code 1897 sec. 4240 et seq.).

[*Title.*]

To Said Court:

For cause of action the plaintiff alleges:

I. That the parties, plaintiff and defendants, are owners in fee simple and in actual and lawful possession of all the real estate described in a "Statement" hereto annexed, marked "Exhibit A" and made a part of this petition; and to which reference is now made.

II. That the respective parties in this cause, acquired their title to said lands from the last prior owner thereof in

the manner briefly stated as follows: [*State how titles were acquired.*]

III. That all the parties in this action have attained their legal majority, except the following named persons, whose ages are as follows: [*State names and ages of minor defendants*], and plaintiff asks that a guardian ad litem be appointed by the court for all minor defendants herein, who may appear, answer and defend for them as provided by law.

IV. That the respective shares and interests of the several owners and parties aforesaid in and to said real estate are as follows, to-wit: [*state interests*].

V. Plaintiff attaches to this petition "Abstracts of Title" relied upon: showing from and through whom the title of the parties herein to said lands was obtained and how the same is formed and was created, also giving the necessary dates of conveyances and titles and the book and page where recorded, together with a full and true description of all the lands involved in this action and the relative share therein of the respective parties hereto and other facts, and whereever such title or any portion thereof is not in writing, or does not appear of record, then a full statement of the facts are set forth in and upon said "Abstracts."

VI. Said "Abstracts" and the statements annexed thereto, also show the nature and extent of all contingent interests in said property and of all charges and incumbrances upon or affecting said lands and the names of the persons holding or claiming to hold such interests, liens or charges so far as the plaintiff have been able to ascertain the same. Said "Abstracts and Statements" are made part of this petition and reference is now made thereto for full particulars.

VII. Before making an order of sale or partition herein, the court is asked, [if deemed in its opinion necessary] to refer to the clerk of this court, or to a referee to examine and report the nature and amount of all general encumbrances by way of mortgage, judgment, contingent interest, lien, or otherwise, upon any portion of said real estate, and that thereupon such proceedings be had in the premises and in relation thereto as are provided by law.

VIII. Plaintiff alleges the following good and sufficient reasons to the court in order that it may direct the referees to allot particular portions of said land to the particular individuals herein named in making up their distributive

shares in said property, to-wit: [*Give reasons for allotment asked.*]

IX. Plaintiff states that when partition can be conveniently made of part of said premises, but not of all thereof, then that partition be made of the portion susceptible of partition, and that the other portion of said lands be sold as by law provided.

WHEREFORE plaintiff prays for the judgments, and order of this court as follows, to-wit: (1) settling and confirming in the respective parties herein, both plaintiffs and defendants, their aforesaid relative shares in and titles to all the real estate in this action described, and making the same firm and effectual forever in said parties, their heirs, successors and assigns; (2) ordering and decreeing partition to be made accordingly of all of said lands between said parties [or of such portion of said premises as may be susceptible of proper division] and that thereupon this court appoint and commission referees to make partition of said real estate as aforesaid into the requisite number of shares and according to value and to sign and allot to said parties their respective share therein, and that said referees be required in the manner prescribed by law to qualify and act, make reports, plats, mark out said shares by visible monuments, if necessary employ competent surveyor and assistants to aid them, and to describe the respective shares of all the parties in said lands correctly and with reasonable particularity, and in all other respects to act in accordance with the orders of this court and the laws of this state; (3) upon the "Reports" and "Plats" of the referees being confirmed it is asked, that judgment and decree thereon be rendered and recorded, making the partition of said lands as shown thereby firm and effectual forever, and accordingly confirming and quieting the titles and shares of said parties in said property; (4) should it be apparent (or the parties so agree) that the aforesaid real estate cannot be equitably divided into the requisite number of shares, then it is prayed that a sale of said lands be ordered and decreed by this court in the manner prescribed by law, and that referees be accordingly appointed, commissioned and qualified, and that they give notice, and conduct and make sale of said real estate and execute and deliver good and sufficient deeds of conveyance for said property to the purchaser thereof, all in

accordance with the provisions of the laws of this state and under and subject to the orders and approval of this court, and that said referees make and cause to be filed in this action full and true reports of their proceedings in the premises; (5) that the net proceeds arising from the sales of said lands be distributed among all the parties herein in proportion and in accordance with their respective shares in said lands, and that the same be paid over to them by said referees in due time; (6) that such further orders, approval and decrees as may be required in the premises and under the law be made and recorded by the court; (7) that the proper costs and the expenses pertaining to abstracts and other necessary and lawful matters together with the attorney's fees as provided by statute in and about this action and pertaining to the partition or sale of said premises be ordered, assessed and adjudged to be paid by all the parties in this action in proportion to their respective interests in said lands, and that said costs, expenses and attorney's fees be decreed to be and shall remain liens upon such shares until paid, and that the parties entitled thereto have power to enforce the collection thereof by "Fee Bill" or "Special Execution" against the party in default or against the land assigned to him.

L.... M....
Attorney for Plaintiff.

[*Venue.*]

I, A.... B...., being duly sworn on oath depose and say that I am the plaintiff in the foregoing petition and that said petition, abstracts, statements, description of lands, "Exhibit A", have been examined by me and read to me and that I understand and know the contents thereof and statements therein, and that the same and all allegations and averments thereof are true as I verily believe.

A.... B....

[*Jurat.*]

"STATEMENT" AND "EXHIBIT A".

The following is a true description of all the real estate involved in this action, and mention in paragraph I of this petition, and as set forth in the "Abstracts of Title" in this cause:

.....
.....
.....

CHAPTER LXX.

COMPLAINTS FOR ADMEASUREMENT OF DOWER.

1635. By widow, for admeasurement of dower.

In a number of states, estates in dower and by the curtesy have been abolished. Cal. C. C. 1906 sec. 173; Colo. Stats. Ann. 1911 sec. 7040; Idaho Rev. Codes 1908 sec. 268; Kans. Gen. Stats. 1909 sec. 2961; Neb. R. S. 1913 sec. 1268; N. Dak. Rev. Codes 1905 sec. 5188; S. Dak. C. C. 1908 sec. 1095; Okla. Comp. Laws 1909 sec. 8986; Utah Comp. Laws 1907 sec. 2832; Wash. Rem. and Bal. Code 1910 sec. 1343; Wyo. Comp. Stats. 1910 sec. 5727. The same is true in Iowa and Minnesota, although in those states the estate in fee given in its stead is often denominated dower. Iowa Ann. Code 1897 sec. 3366; Minn. Gen. Stats. 1913 sec. 7238. In other states the estate in dower is still recognized and regulated by the statutes. Wis. Stats. 1913 sec. 2159; Ark. Dig. of Stats. 1904 sec. 2687; Mont. Rev. Codes 1907 sec. 3708; Mo. R. S. 1909 sec. 345; Oregon Laws 1910 sec. 7286. Doubtless courts of equity retain jurisdiction to assign dower to a widow where by law the estate still exists. However, as the statutes generally provide for the admeasurement by summary proceedings on petition to the probate court, it is probable that the following form will be of little practical use, as under ordinary circumstances the rule is general that courts of general jurisdiction will refuse to entertain actions when there is a complete and adequate remedy in the probate court.

1635. By widow, for admeasurement of dower.

I. That on or about the .... day of ....., 19.., the plaintiff intermarried with C.... D.... late of ..... county, who afterward, on or about the .... day of .....,

19..,* departed this life intestate a resident of said county, leaving the plaintiff his widow, and E.... F.... and G... H.... his children and only heirs at law, and that letters of administration were thereafter and on or about the .... day of ....., 19.., duly granted to the defendant J.... K.... upon the said estate, and that the said J.... K.... is still such administrator, duly qualified and acting. [*Or, if deceased left a will:* * departed this life a resident of said county, leaving the plaintiff his widow, and a last will and testament, which was on the .... day of ....., 19.., duly admitted to probate by the ..... court of ..... county, and a copy thereof is attached hereto, made part of this complaint, and marked Exhibit A, and that letters testamentary thereon were duly granted by said court on the .... day of ....., 19.., to the defendant J.... K...., who is still such administrator duly qualified and acting.]

II. That the said C.... D.... died seized in fee and possessed of the following described premises [*insert description*].

III. That upon the death of the said C.... D.... said lands and premises descended to the defendants E.... F.... and G.... H.... as heirs at law of the said C.... D.... [*or*, were devised to the said E.... F.... and G.... H.... by the terms of said will] subject to and charged with the right of dower of the plaintiff therein [*if provision for the widow is made by the will add:* and that this plaintiff did, on the .... day of ....., 19.., duly elect in writing to accept the provisions made for her in lieu of dower by the terms of said will].

IV. That the plaintiff, by reason of said marriage, upon the death of said C.... D.... became entitled to dower in the lands above described, which dower has never been assigned to her, nor has she received any equivalent therefor, or released the same.

V. That the said premises are in the possession of the defendant L.... M.... who claims some interest in or right to the possession thereof, or some part thereof, which right or interest, if any, is subject to the plaintiff's right of dower therein.

VI. [*State any facts showing that the remedy in the probate court is inadequate.*]

WHEREFORE plaintiff demands judgment establishing and adjudging her said right of dower in the real estate above mentioned and described, and that the same be set off and apportioned to her by reference, or otherwise, as the court may direct; and for such other and further relief as may be just and equitable.

CHAPTER LXXI.

COMPLAINTS IN ACTIONS TO QUIET TITLE OR DETERMINE ADVERSE TITLES TO REAL ESTATE.

1636. Complaint by owner in statutory action to quiet title. (Wisconsin.)
1637. The same, by mortgagee. (Wisconsin.)
1638. Complaint in statutory action by one in possession to quiet title. (Minnesota.)
1639. Complaint in statutory action by owner to quiet title to vacant or unoccupied land. (Minnesota.)
1640. Complaint by owner in statutory action to quiet title. (Iowa.)
1641. By owner in statutory action to quiet title. (North and South Dakota.)
1642. The same, when possession of the premises is also sought. (North and South Dakota.)
1643. Complaint in equity to enjoin a judicial sale and remove cloud.
1644. Complaint in equity to cancel a mortgage which is a cloud upon title, general form.
1645. By owner to cancel mortgage which has been paid.
1646. By owner to cancel mortgage obtained by duress.
1647. By owner to cancel deed and quiet title.
1648. Complaint in equity by owner to set aside illegal tax or assessment.
1649. Complaint by owner in action to set aside tax claims.
1650. Complaint in statutory action by tax title claimant to bar original owners. (Wisconsin.)
1651. Petition in action to quiet title. (Iowa.)
1652. Complaint by tax certificate holder to quiet title. (Minnesota.)
1653. Outline of complaint to have mortgage cancelled for duress.

Courts of equity have exercised the power to prevent or remove clouds on the title of land, from very early times. In such an action it must appear by the comp'aint that it is brought by the owner, and that the cloud to be removed is an apparent incumbrance which renders a resort to evidence outside of the record necessary to show that it is invalid. When these facts are shown, the court will grant full relief by the reformation, surrender, or cancellation of deeds or other instruments, or the execution of deeds or releases as

may be necessary. Pier v. Fond du Lac, 38 Wis. 470. In addition to this ancient remedy the statutes of most of the states provide similar remedies. [1]

[1] In *Wisconsin* any person having title and possession of land, or having title to vacant land, or owning any incumbrance on land, may bring an action against any person making any claim thereto, for the purpose of establishing the plaintiff's right. Wis. Stats. 1913 sec. 3186.

In *Arizona* an action to determine and quiet the title to real property may be brought by any one having, or claiming, an interest therein, whether in or out of possession of the same, against any person or corporation or the state or Arizona, when such person, corporation or state claims any estate or interest, adverse to the party bringing the suit, in or to the real estate, the title to which is to be determined or quieted by the action brought. Ariz. R. S. 1913, sec. 1623.

In *Arkansas* and *Nebraska* an action may be brought and prosecuted to final decree, judgment or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons, whether in actual possession or not, who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate. Ark. Dig. of Stats. 1904 sec. 6517; Neb. R. S. 1913 sec. 6266; 6268.

In *California*, *Idaho*, *Montana*, *South Dakota*, and *Utah*, an action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim. Cal. C. C. P. 1905 sec. 738; Idaho Rev. Codes 1908 sec. 4538; Mont. Rev. Codes 1907 sec 6870; South Dak. C. C. P. 1908 sec 675; Utah Comp. Laws 1907 sec. 3511.

In *Colorado*, *Kansas*, *Oklahoma*, and *Wyoming*, an action may be brought by any person in possession, by himself or his tenant, of real property against any person who claims an estate therein adverse to him, for the purpose of determining such adverse claim, estate or interest. Colo. Code Ann. 1911 sec. 274; Kans. Gen. Stats. 1909 sec. 6213; Okla. Comp. Laws 1909 sec. 6121; Wyo. Comp. Stats. 1910 sec. 4964.

In *Iowa* an action to determine and quiet the title of real property may be brought by any one, whether in or out of possession, having or claiming an interest therein, against any person claiming title thereto, though not in possession. Iowa Ann. Code 1897 sec. 4223.

In *Minnesota* any person in possession of real property by himself or his tenant, or any person having or claiming title to vacant or unoccupied real property, may bring an action against any person who claims an estate or interest therein, or a lien thereon, adverse to him, for the purpose of determining such adverse claim and the rights of the parties, respectively. Minn. Gen. Stats. 1913 sec. 8060.

In *Missouri* any person claiming any title, estate or interest in real property, whether the same be legal or equitable, certain or contingent, present or in reversion or remainder, whether in possession or not, may institute an action against any person or persons having or claiming to have any title, estate, or interest in such property, whether in possession or not, to ascertain and determine the estate, title and interest of said parties, respectively, in such real estate, and to define and adjudge by its judgment or decree the title, estate and

1636. Complaint by owner in statutory action to quiet title (Wis. Stats. 1913 sec. 3186).

I. That the plaintiff is the owner in fee simple of the following described premises, to-wit [*describe same*] situate in said county, and state of Wisconsin; and that he is in the actual possession and occupancy thereof [*or*, that the said premises are vacant and unoccupied].

interest of the parties severally in and to such real property. Mo. R. S. 1909 sec. 2535.

In *North Dakota* an action may be maintained by any persons having an estate or interest in or lien or incumbrance upon real property whether in or out of possession thereof, and whether said property is vacant or unoccupied against any persons claiming an estate or interest in or lien or incumbrance upon the same for the purpose of determining such adverse estate, interest, lien or incumbrance. N. Dak. Rev. Codes 1905 sec. 7519.

In *Oregon* any person claiming an interest or estate in real estate not in the actual possession of another may maintain a suit in equity against another who claims an interest or estate therein adverse to him, for the purpose of determining such conflicting or adverse claims, interests, or estates. Oregon Laws 1910 sec 516.

In *Washington* any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action, to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title. An action to quiet title may also be brought by the known heirs of any deceased person, or of any person presumed in law to be deceased, or by the successors in interest of such known heirs after adverse possession of ten years, against the unknown heirs of such deceased person or against such person presumed to be deceased and his unknown heirs, also by any person in the actual possession of real property, against the unknown heirs of a person known to be dead, or against any person where it is not known whether such person is dead or not, and against the unknown heirs of such person, and if it shall thereafter transpire that such person was at the time of commencing such action dead the judgment or decree in such action shall be as binding and conclusive on the heirs of such person as though they had been known and named. Wash. Rem. and Bal. Code Supp. 1913 sec. 785.

It seems that in *Texas* the action to quiet title has been abolished and is now governed by action of trespass to try title. Tex. Civ. Stats. Ann. 1913 articles 7731-7768. As to bringing such actions against non-residents, the statute is as follows: "An action may be brought and prosecuted to final decree, judgment or order, by any person claiming a right or interest in or to any property in this state, against any person or persons who are non-residents of this state, or whose place of residence is unknown, or who are transient persons, who claim adverse estate or interest in, or who claim any lien or incumbrance on said property, for the purpose of determining such estate, interest, lien, or incumbrance, and granting the title to said property, or settling the lien or incumbrance thereon." Art. 2172.

II. That the defendant makes some claim to said premises, adverse to the plaintiff's said title, whereas in truth and in fact the defendant has no interest or estate in said premises of any nature.

WHEREFORE the plaintiff demands judgment that his claim to said premises be established against any claim of the defendant therein, and that the defendant be forever barred against having or claiming any right or title to the said premises adverse to the plaintiff; and that he release to the plaintiff all claim to said premises, and pay the costs of this action, and that the plaintiff have such further relief as may be just and equitable.

1637. The same, by mortgagee (Wis. Stats. 1913 sec. 3186).

I. That the plaintiff is the owner and holder of an incumbrance or lien upon the following described premises [*describe same*] which said incumbrance or lien consists of a mortgage thereon duly executed by G.... H.... the owner in fee of said premises, on the .... day of ....., 19.., to secure the payment of ..... dollars, and which mortgage is still subsisting and unpaid.

II. [*As in last preceding form, substituting the word incumbrance or mortgage, for the word title.*]

WHEREFORE, etc. [*prayer for judgment as in the last preceding form.*]

1638. Complaint in statutory action by one in possession to quiet title (Minn. Gen. Stats. 1913 sec. 8060. Held sufficient in Barber v. Evans, 27 Minn. 92; 6 N. W. 445).

I. That the plaintiff is the owner in fee and in the actual possession of [*describing premises*] in the county and state aforesaid.

II. That defendant claims an estate or interest in said premises or lien thereon adverse to the plaintiff.

WHEREFORE plaintiff demands judgment that the said defendant has no estate or interest in said premises or lien thereon, and for the costs and disbursements of this action.

1639. Complaint in statutory action by owner to quiet title to vacant or unoccupied land (Minn. Gen. Stats. 1913 sec. 8060).

I. That the plaintiff is the owner in fee of the following described lands [*describe same*] and that the same are vacant and unoccupied.

II. That the defendant claims an interest or estate in said premises, or lien thereon adverse to the plaintiff.

WHEREFORE plaintiff demands judgment that he be declared to be the owner in fee of said premises, and that the defendant has no interest therein or lien thereon, and for the costs and disbursements of this action.

1640. Complaint by owner in statutory action to quiet title (Iowa Ann. Code 1897 sec. 4224).

I. That the plaintiff is the owner in fee simple of the following described real estate [*insert description*].

II. That the plaintiff is credibly informed, and believes, that the defendant makes some claim adverse to the estate of the plaintiff in said property.

WHEREFORE the plaintiff prays judgment that his estate be established against the adverse claims of the defendant, and that said defendant be barred and forever estopped from having or claiming any right or title adverse to the plaintiff in and to said premises, that the defendant be adjudged to pay the costs of this action.

[*The statute requires that the petition be verified.*]

1641. By owner in statutory action to quiet title (N. Dak. Rev. Codes 1905 sec. 7519; S. Dak. C. C. P. sec 675).[2]

I. That the plaintiff is the owner in fee simple of the following described real estate [*insert accurate description.*]

II. That the defendant wrongfully claims an estate or interest in the real estate adverse to the said plaintiff.

[2] A complaint alleging that the plaintiff is the owner in fee, and that the defendant claims an adverse estate or interest is sufficient under such a statute. Clark v. Darlington, 7 S. Dak. 148; 63 N. W. 771; Ely v. Ry. Co., 129 U. S. 291; 9 Supt Ct. 293. The holder of a certificate of tax sale claims an "estate or interest" in lands within the meaning of the statute. Clark, v. Darlington, *supra;* see also McHenry v. Kidder Co., 8 N. Dak. 413; 79 N. W. 875.

WHEREFORE plaintiff demands judgment that the plaintiff's title to said lands be adjudged valid, and that the defendant has no lawful estate or interest in said lands, or any of them, and that the plaintiff recover the costs of this action.

1642. The same, when possession of the premises is also sought (N. Dak. Rev. Codes 1905 sec. 7523; S. Dak. C. C. P. sec. 678).

I. [*As in last preceding form.*]

II. That the defendants C.... D.... and E.... F.... wrongfully claim some interest or estate in said real estate adverse to the plaintiff, and that the defendant E.... F.... is in actual possession of said real estate, and wrongfully withholds the same from the plaintiff.

[*Add to demand for judgment in last preceding form*]: that the plaintiff have a writ for the possession of said premises, etc.

1643. Complaint in equity to enjoin a judicial sale and remove cloud.

I. That at the dates hereinafter mentioned the plaintiff was and still is the owner of the following described premises, viz. [*describe them*].

II. That plaintiff purchased said premises on the .... day of ....., 19.., from one E.... F.... for the sum of ..... dollars, which sum was then duly paid, but that the legal title to said premises has remained in E.... F....

III. That on the .... day of ....., 19.., one G.... H.... recovered a judgment for the sum of ..... dollars in the ..... court for ..... county, against said E.... F...., and on or about the ..... day of ....., 19.., execution was issued on said judgment at the instance of the plaintiff therein, and placed in the hands of O.... P.... sheriff of ..... county, who on the .... day of ....., 19.., levied the same upon said real estate as the property of said E.... F...., and has advertised said real estate for sale on the .... day of ....., 19.., under said execution.

IV. That said judgment is not now and at no time has been a lien upon said real estate, or any part thereof, for the reason that said E.... F.... since the recovery of said judg-

ment, has had no interest in said real estate, and that the sale of said real estate under said execution will cast a cloud upon the plaintiff's title to the same.

WHEREFORE the plaintiff demands judgment that the defendant may be forever enjoined from selling said real estate under said execution, and from enforcing said judgment against said real estate, and that the title to said real estate may be adjudged to be in this plaintiff, free and clear from all claim or lien thereon by virtue of said judgment and execution, and that the plaintiff recover the costs of this action, and have such other and further relief as may be just and equitable.

1644. Complaint in equity to cancel a mortgage which is a cloud upon title, general form.

I. That the plaintiff is the owner in fee simple of the following described premises [*insert description*].

II. [*Allege the making of the mortgage, or other apparent lien, stating facts which show that on its face it appears valid, and that in fact it is void.*]

III. That said mortgage was, on the .... day of ....., 19.., duly recorded in the office of the register of deeds of said county, in Book .... of Mortgages, p ...., and still remains unsatisfied of record, and a cloud upon the plaintiff's title.

WHEREFORE the plaintiff demands judgment that the defendant give up said mortgage to be cancelled, and that the same be satisfied of record; and for the costs of this action.

1645. By owner to cancel mortgage which has been paid.

I. [*Allege ownership of premises as in last preceding form.*]

II. That on the .... day of ....., 19.., the plaintiff made and delivered to the defendant a mortgage upon said premises to secure the payment of a certain promissory note of that date, executed by plaintiff, for the sum of ..... dollars due ....., 19.., which mortgage on said day was duly recorded in the office of the register of deeds of ..... county and still remains of record undischarged.

III. That on the .... day of ....., 19.., the plaintiff paid said notes in full, and thereupon tendered to said defendant his reasonable charges for discharging said mortgage up-

on the records of the county, and requested him to acknowledge satisfaction thereof upon said records, and that more than seven days have elapsed since said tender and request to discharge said mortgage, but said defendant has entirely failed to discharge the same and still refuses so to do.

IV. That said mortgage is a cloud upon plaintiff's title to said real estate [and the plaintiff has sustained damages by reason of the failure of said defendant to discharge the same in the sum of ..... dollars].

WHEREFORE the plaintiff demands judgment that said mortgage may be declared satisfied and discharged of record, and the said cloud upon plaintiff's title be removed [and that he recover ..... dollars, his damages aforesaid] with the costs of this action.

1646. By owner to cancel mortgage obtained by duress (adapted from Galusha v. Sherman, 105 Wis. 263; 81 N. W. 495).

I. [*Allege ownership of property mortgaged, as in preceding form.*]

II. That on or about the .... day of ....., 19.., the defendant A.... B...., with the intent to defraud and cheat the plaintiff, and to obtain from plaintiff the note and mortgage hereinafter described, commenced an action against the plaintiff in the ..... court to recover the sum of ..... dollars, and alleged in the complaint in said action that this plaintiff had knowingly and maliciously given and sold to the said A.... B.... impure, diseased, corrupted and unwholesome food to eat, which allegation was wholly false and known so to be by said defendant A.... B....

III. That the said defendant A.... B.... on or about the said .... day of ....., 19.., caused the said complaint and summons in legal form to be served on this plaintiff by one E.... F.... and that the said E.... F.... at the time of the service and at the direction of the defendant A.... B.... told the plaintiff that he [plaintiff] had committed a crime against the laws of this state, and was liable to imprisonment therefor, and that unless the plaintiff settled the said action he [the plaintiff] would be arrested on a criminal warrant and imprisoned in the state prison, but that if he

settled the same no criminal proceeding would be commenced.

IV. That the plaintiff, fearing that the defendant would execute said threats and cause this plaintiff to be arrested and imprisoned, proceeded with the said E.... F.... to the city of ..... and to the office of the defendant A.... B.... and that the said A.... B.... [and one G.... H....] then and there told this plaintiff that he would have to pay said A.... B.... the sum of ..... dollars, and that unless he did so or gave a mortgage therefor upon his said real estate he [the plaintiff] would be arrested on criminal warrant and imprisoned in the state prison; all of which threats and statements were false and fraudulent in fact and were made wih intent to intimidate and defraud this plaintiff.

V. That this plaintiff was overcome with great fear by reason of said threats, and his judgment and power of will were thereby coerced and subdued; and believing that if he did not pay said sum of money or give said mortgage as demanded he would be arrested and imprisoned as aforesaid, this plaintiff, in order to avoid such prosecution and imprisonment and for no other purpose or consideration executed and delivered to the defendant A.... B.... his promissory note [*describe the note*] and to secure payment thereof at the same time executed and delivered to the defendant A.... B.... a certain mortgage upon the said real estate [*describe mortgage*] which said mortgage was immediately recorded by the said defendant in the office [*name proper office*] and is still of record undischarged.

VI. That the said note and mortgage were so executed and delivered without any consideration whatever, and under the compulsion and duress of the aforesaid threats of prosecution and imprisonment, and are wholly void, but that the said mortgage constitutes an apparent cloud upon the title of the plaintiff to said real estate.

VII. That the defendant A.... B.... is still the holder of said note and mortgage [*or if assigned, allege assignment and assignee's knowledge of facts and make such assignee a defendant*].

WHEREFORE plaintiff demands judgment that said note and mortgage be declared void, and that the same be delivered up and cancelled and discharged of record, and the cloud upon plaintiff's title to said real estate removed, and

that said defendant be enjoined and restrained from selling or transferring said note and mortgage, and for such further relief as may be just and equitable, with costs.

1647. By owner to cancel deed and quiet title.

I. That on the .... day of ....., 19.., one E.... F.... was the owner in fee of the following described premises [*describe same*] and that said E.... F.... on said day sold and conveyed the same by deed duly executed to G.... H.... who thereafter and on the .... day of ....., 19.., sold and conveyed the same by deed duly executed to this plaintiff.

II. That immediately after the conveyance of said premises to this plaintiff he went into actual possession of the same, and has used, occupied and possessed the same ever since that time and is still in possession thereof, and has made valuable improvements thereon, of the value of ..... dollars.

III. That all of the said conveyances of said premises except the deed from E.... F.... to G.... H.... were duly recorded in the office of the register of deeds of ..... county, soon after the same were executed and delivered, but by accident said deed from E.... F.... to G.... H.... was not recorded until about the .... day of ....., 19.., and while the plaintiff was in possession of said premises.

IV. That on or about the .... day of ....., 19.., the defendant J.... K.... obtained, with full knowledge and notice of the plaintiff's ownership of said premises, a quit-claim deed for said premises from said E.... F.... for an alleged consideration of ..... dollars, and has had the same recorded in the office of the register of deeds of said county, and now claims title to said premises against the plaintiff under said deed, and that said deed is a cloud upon the plaintiff's title to said premises, and tends to depreciate the value thereof.

WHEREFORE the plaintiff demands judgment that said deed from E.... F.... to J.... K.... may be set aside and declared null and void, and that the cloud upon plaintiff's title caused thereby may be removed; and for such other relief as equity may require, and for the costs of this action.

1648. Complaint in equity by owner to set aside illegal tax or assessment.

I. [*Allege ownership of premises in plaintiff, as in preceding forms.*]

II. [*Allege corporate character of city or other municipal corporation which has attempted to levy the tax.*]

III. [*Allege levy of tax or assessment upon the plaintiff's lands, and issuance of tax certificates or deeds, if any; the holder should be made a defendant.*]

IV. [*Allege with certainty and particularity the defects or illegalities in the levy which are relied on to avoid the tax.*]

V. [*Allege tender of amount equitably due if one has been made, or otherwise allege willingness to pay same unless the land be exempt or the tax has been in fact paid, or the tax was without jurisdiction.*]

WHEREFORE [*demand of judgment for cancellation of tax and certificates or deeds, with prayer for injunction if necessary*].

1649. Complaint by owner in action to set aside tax claims.

I. That the plaintiff is the owner in fee [and in possession] of the following premises: [*describe same*].

II. [*If the premises are vacant:*] That said premises are vacant and unoccupied.

III. That defendant claims a title or interest in said premises, or lien thereon adverse to the plaintiff, by and through a certain tax certificate [*or* tax deed] described as follows: [*insert description of certificate or deed*].

IV. That said tax certificate [*or* tax deed] is void by reason of the fact [*allege ground of invalidity*].

V. [*If it is necessary under the local statute to allege payment of the tax or tender of the amount due, insert the allegation here.*]

WHEREFORE plaintiff demands judgment that said tax certificate [*or* tax deed] be adjudged void, and that the cloud thereby created upon plaintiff's said title be removed, and that plaintiff recover the costs and disbursements of this action.

1650. Complaint in statutory action by tax title claimant to bar original owners (Wis. Stats. 1913 secs. 1197–1199).

I. That the plaintiff claims title to the following described lands and premises, to-wit [*describe same*] under and by virtue of a certain tax deed made, executed and delivered to the plaintiff, pursuant to law, on the .... day of ....., 19.., by the county clerk of said county of ..... [*or other officer, as the fact may be*], of which deed a true copy is hereto annexed, marked Exhibit A, and made a part of this complaint.

II. That the defendants C.... D.... and E.... F.... were the former owners of said tracts described in said deed, and the defendants G.... H.... and J.... K.... claim, under said former owners, to-wit, the said G.... H.... claims [*describe parcel*] under the defendant C.... D.... and the defendant J.... K.... claims [*describe parcel*] under the defendant E.... F....

III. That the plaintiff has paid in taxes on said premises as follows [*here specify amount of taxes paid by plaintiff, including redemptions, stating dates of payment*].

WHEREFORE the plaintiff demands judgment against said defendants that they be barred of all right, title, interest or claim in said lands, or any part thereof, and for the costs and disbursements of this action.

1651. Petition in action to quiet title (Iowa Ann. Code 1897 secs. 4223, 4224).

[*Title.*]

To Said Court:

For cause of action, the plaintiff herein avers:

I. That the plaintiff now and ever since on or about ....., 19.., has been the owner in fee simple of all the real estate hereinafter described.

II. That plaintiff now has the actual, exclusive and adverse possession of all said lands, and that plaintiff and the parties under whom he claims title and holds possession as herein stated, have had and held said real estate and the actual, uninterrupted, exclusive and adverse possession of all of the same ever since on or about ....., 19.., in good faith and under claim of right and color of title thereto.

III. That during the entire period aforesaid plaintiff and the parties under whom he claims title and possession, paid all the public taxes upon and against said lands, and they also expended large sums of money for said property and for fixtures and appurtenances thereon and in making permanent, necessary and valuable improvements upon said real estate, and no part of said taxes or sums of money have ever been refunded, paid, nor tendered by any of said defendants.

IV. That a full and true description of all the real estate mentioned and involved in this action is given in a "Statement" "Exhibit A", annexed hereto and made part of this petition, and to which reference is now directed.

V. That plaintiff is credibly informed and believes that the defendants herein claim title to said real estate and that the said defendants make some claim adverse to the estate and to the title and possession of your petitioner as aforesaid in and to said lands.

VI. The adverse claims of the defendants herein to your petitioner's estate as aforesaid and in the interest such persons have or claim to have in and to said real property, and how the same were derived or are claimed to have been derived as exactly as possible and to the best of plaintiff's information and belief, are as follows, to-wit: [*state claims made by defendants*].

VII. That in this action it is necessary to make unknown persons defendants for the reason that the names and residence of such persons are unknown to plaintiff and that plaintiff sought diligently to learn the names and residences of said persons and defendants without ascertaining the same wherefore it is asked that proceedings may be had against such persons without naming them as provided by the laws of this state.

VIII. Plaintiff alleges in relation to said alleged and adverse claims and interests on the part of said defendants and in denial thereof state as follows, to-wit: [*state the facts as claimed by plaintiff*].

IX. That any and all such claims or interests upon the part of each and all of the defendants to this action are inferior and wholly subject to the prior and paramount title and possession of the plaintiff herein, in and to said real estate, and this court is asked to so find, and decree.

X. The plaintiff files and submits herewith an "Abstract of Title" to said lands with statements and memoranda thereon which show all the necessary facts, records, conveyances, description of lands, and other things required by law to make and vest in your petitioner a full and unqualified title in fee simple in and to all the aforesaid real estate and this court is asked to carefully examine the same and thereupon to find, adjudge and decree that plaintiff's title to and possession of said lands are as herein stated, and as shown and claimed upon said abstracts under and by virtue of the evidence, proofs and the testimony of witnesses to be offered and considered upon the hearing and trial of this action, and that the clerk of this court be ordered and required to attach his official certificate to said abstracts indicating the findings, adjudication and decree aforesaid and return said abstracts with said certificate annexed to plaintiff.

WHEREFORE plaintiff prays that upon final hearing it be further found, adjudged and decreed that the several allegations of this petition are true and that plaintiff have judgment and decree in accordance therewith and that plaintiff's title to, and possession of all said real estate to the extent and in the manner claimed in this petition be determined, established, confirmed, and quieted in the plaintiff in this action, his heirs, successors and assigns, forever against all adverse claims upon the part of each and all of the defendants in this cause and as against all persons who may now or hereafter claim under or through them or either of them; and that all apparent imperfections, or clouds upon plaintiff's title to said land be now and forever removed, and that the title and possession of said premises be decreed firm and effectual forever in plaintiff, and that all said defendants be barred and forever estopped from having or claiming any right or title in or to said real estate adverse to the plaintiff herein.

L.... M....
Attorney for Plaintiff.

[*Venue.*]

I, A.... B...., on oath, depose and say that I am the plaintiff in this action, and that the above and foregoing petition and Exhibit A, description of lands annexed, have been read to me and that I have also examined and read the abstracts of titles and statements referred to in said petition,

and understand and know the contents of said petition, Exhibit A, and abstracts, and this affiant believes the statement thereof to be true.

A.... B....

[*Jurat.*]

"STATEMENT" AND "EXHIBIT A"

The following is a full and true description of all the real estate mentioned and involved in this action; and referred to in paragraph IV in the foregoing petition, to-wit: [*Insert description*].

1652. Complaint by tax certificate holder to quiet title (Minn. Gen. Stats. 1913 sec. 2168).

I. That the plaintiff is the owner and holder of a certain tax certificate issued by the auditor of ..... county, Minnesota, dated the .... day of ....., 19.., a copy of which certificate is attached to this complaint, marked "Exhibit A", and that the period of redemption from the tax sale upon which such certificate was issued expired on the .... day of ....., 19.., and prior to the commencement of this action.

II. That the lands and premises covered by the said tax certificate are situated in the city of ....., in said county and state, and are described as follows: [*insert description*], and that the same are in the possession of the defendant C.... D....

III. That the defendants above named claim to have an interest in said premises or a lien thereon adverse to the plaintiff.

WHEREFORE plaintiff demands judgment that he is the owner in fee of said premises and that the defendants have no estate or interest therein or lien thereon, with costs.

1653. Outline of complaint to have mortgage cancelled for duress.

I. [*Allege plaintiff's ownership of the mortgaged premises describing same.*]

II. [*Allege the circumstances leading up to the alleged duress, as for instance that plaintiff's son was employed by the defendant and in such capacity entrusted the defendant with*

the custody of money and property and in the course of said employment misappropriated certain of such moneys.]

III. [*Allege the arrest of plaintiff's son, and the threats made to plaintiff by defendant that if the moneys were not repaid he would cause the conviction of the plaintiff's son and his imprisonment in the states prison.*]

IV. [*Allege the effect of the threats on the plaintiff, showing that they caused a loss of his will power, as for instance*]: that plaintiff, being greatly terrified, frightened and shocked, and fearing that the defendant would procure the conviction and imprisonment of his said son, and thereby entail shame, disgrace and mortification upon himself and his family, and ruin and distress upon his son, became nervous, excited and greatly distressed, both in body and mind, and for a considerable time entirely lost the control of his will.

V. That, while in this condition, defendant informed the plaintiff that unless he should execute a bond and mortgage upon said premises as security for the payment to defendant of ..... dollars he would procure the conviction and imprisonment of the plaintiff's said son, and the plaintiff thereupon, while under the influence of the coercion, fear, and duress created by said threats, executed and delivered to the defendant a bond and mortgage [*describe same*].

VI. [*Allege the recording of the mortgage and the fact that defendant is about to enforce the same or assign it to innocent third parties as the fact may be.*]

WHEREFORE, etc. [*Demand of judgment for cancellation and release of the mortgage, and injunction against its sale or negotiation.*]

CHAPTER LXXII.

COMPLAINTS IN CREDITORS' ACTIONS TO REACH NON-LEVIABLE ASSETS OR PROPERTY FRAUDULENTLY CONVEYED.

1654. Complaint by judgment creditor to set aside fraudulent conveyance of real estate, general form.

1655. The same, where plaintiff sues on behalf of himself and other judgment creditors.

1656. The same, upon a justice's judgment.

1657. Against debtor to reach demands due from third persons.

1658. Against the judgment-debtor, his assignee, and a pretended creditor named in the assignment, to set aside a general assignment for fraud extrinsic to the instrument.

1659. To set aside an assignment which is void on its face.

1660. Against debtors who transferred their assets to a third person for his note, and assigned the note for benefit of creditors, seeking to set aside the transaction as fraudulent, and for a receiver.

1661. Against debtor and his trustee, to reach the trust fund or its income.

1662. By an assignee of a judgment, against the judgment debtor and his mortgagee of personal property and an assignee to whom, by a fraudulent agreement between them, the debtor's property, including the mortgaged property, had been transferred.

1663. Against judgment-debtor and one to whom he fraudulently confessed judgment to set aside judgment and sale thereunder.

1664. Complaint by two creditors suing together, against debtor and his fraudulent grantee, to set aside conveyance of real estate.

1665. By attaching creditor in aid of writ of attachment against fraudulent grantee, to set aside deed of real estate.

1666. By judgment creditor against debtor and fraudulent grantee, to set aside fraudulent transfer of personal property.

1667. By judgment creditor against the debtor, his wife, two other fraudulent grantees of personal property, and a banking corporation, to reach concealed personal property and moneys.

1668. By judgment creditor to set aside conveyance made prior to the creation of the indebtedness due to the plaintiff.

1669. By creditor to reach salary due the debtor.

1670. By judgment creditor, to reach royalties falling due from publishers to the debtor under a contract.
1671. By assignee in bankruptcy to recover unlawful preference, or its value.
1672. By administrator or executor, to reach property fraudulently conveyed by his intestate or testator.
1673. By creditor against administrator and grantee of deceased debtor, when estate is insufficient to pay claims proven.
1674. By creditor of deceased debtor, to reach land purchased by the debtor, but conveyed to a third person in fraud of creditors.
1675. Complaint by a judgment creditor against insolvent corporation and its officers, to reach unpaid stock subscriptions and corporate assets fraudulently conveyed by the officers to themselves.
1676. By judgment creditor to enforce resulting trust in land purchaser by debtor and conveyed to a third person.
1677. Outline of complaint against agent wrongfully taking title of real estate in his own name.
1678. By judgment creditor to reach proceeds of real property in hands of fraudulent grantee, where such grantee has conveyed to a bona fide purchaser.
1679. By receiver of building association against withdrawing members for contribution.
1680. By sheriff suing in aid of attachment.

Where tangible personal property which is subject to levy and sale on execution has been transferred by a debtor in fraud of creditors, it may be seized by attachment or levied upon and sold under an execution, and in such case it will be unnecessary for the creditor to bring any action to set aside the alleged fraudulent sale or transfer. The sale upon execution will carry the title and possession, and if the fraudulent grantee desires to test the validity of his title he will be compelled to bring an action of trespass, replevin or trover, in which action the purchaser may by answer set up the fraudulent character of the plaintiff's title.

Generally in the states covered by this work such property as non-leviable assets in the possession of the fraudulent grantee may be reached by garnishment. See the statutes on garnishment in the various states cited in the notes to Chapter XI of this work. Such is the rule in most jurisdictions in the absence of statute. Am. & Eng. Ency. of Law, vol. 14, pp. 790, 791 and notes; Bank v. Council Bluffs F. Co., 89 Iowa, 618; 57 N. W. 444; N. S. B. & S. Co. v. Ladd, 32 Minn. 38; 20 N. W. 334.

In case of the fraudulent transfer of real estate a creditor, after having obtained judgment and issued execution, may generally maintain an action in equity to remove the fraudulent obstruction to the satisfaction of his judgment by a decree declaring the transfer void. This is a creditors' action in aid of execution simply, and is for the benefit of the creditor who brings the action, and none others. After the return of an execution unsatisfied he may bring an action to set aside fraudulent conveyances or incumbrances on real estate, or to reach non-leviable assets which the debtor refuses to apply to the payment of his debt, and the relief sought should include provisions for the satisfaction of the debt out of the property fraudulently conveyed or concealed. Personal property which is leviable in its character, but which has been fraudulently conveyed, may in some jurisdictions be reached in the same manner, if it appears that the creditor will be seriously embarrassed and the property sacrificed by attempting to enforce the remedy at law. Gullickson v. Madsen, 87 Wis. 19; 57 N. W. 965. See generally on this subject Wis. Stats. 1913 secs. 3029-3186; Gates v. Boomer, 17 Wis. 455; Cornell v. Radway, 22 Wis. 260; Evans v. Laughton, 69 Wis. 138; 33 N. W. 573; Alhhauser v. Doud, 74 Wis. 400; 43 N. W. 69; Gilbert v. Laughton, 69 Wis. 138; 33 N. W. 573; Pierstorff v. Jorges, 86 Wis. 128; 65 N. W. 735. This action is for the benefit of all creditors similarly circumstanced, except that specific liens which have been obtained by judgment or otherwise will be preserved.

In Minnesota, in order to reach land fraudulently conveyed it is necessary that the creditor first obtain judgment, and docket it in the county where the land lies; the issuance of execution is unnecessary. Minn. Gen. Stats. 1913 sec. 7013; Massey v. Gorton, 12 Minn. 145; Scanlan v. Murphy, 51 Minn. 536; 53 N. W. 799. But in an action to reach equitable assets an execution must first have been issued and returned unsatisfied. Wadsworth v. Schisselbauer, 32 Minn. 84; 19 N. W. 390.

In Iowa, under Iowa Code 1897 sec. 4087, the action, or equitable proceeding as it is there called, may be brought at any time after judgment. No mention is made of the issuance or return of execution, but it is doubtless safer that such steps be taken and alleged in the petition.

Such an action can in no case be brought by a mere creditor at large who has not recovered judgment, unless by virtue of some special statutory provision. There are various pro visions authorizing the maintenance of such actions by receivers, assignees, administrators, and other officers, on behalf of creditors; when so brought, the complaint must of course allege the representative character of the plaintiff, and the taking of such steps as may be made necessary by the particular statute to authorize the maintenance o the action.

The action may be brought against corporations and their fraudulent grantees, but it is held in Wisconsin in case of domestic corporations that if a judgment creditor subsequently brings action to sequestrate the property of the corporation under Wis. Stats. 1913 secs. 3216-3228, the previous action will be enjoined under sec. 3227. Pierce v. Mill Construction Co., 38 Wis. 253.

The statutes relating to the subject in other states are cited in the note.[1]

1654. Complaint by judgment creditor to set aside fraudulent conveyance of real estate, general form.

I. That on the....day of....., 19.., in an action then pending in the.....court of the county of..... state of..... a judgment was duly rendered and given by said court in favor of this plaintiff and against the defendant C.... D.... for the sum of.....dollars, which judgment was founded upon a claim which accrued prior to the conveyance hereinafter set forth.

II. That on said day [*or* on the....day of....., 19..] said judgment was duly docketed in the office of the clerk of court for the county of..... wherein said defendant C.... D.... then resided.

III. That on the.... day of....., 19.., an execution was duly issued out of said court against the personal and real property of said defendant C.... D...., and delivered

[1] Ark. Dig. of Stats. 1904 sec. 6297; Cal. C. C. P. 1906 sec. 720; Colo. Code Ann. 1911 sec. 270; Idaho Rev. Codes 1908 sec. 4510; Mont. Rev. Code; 1907 sec. 6129; Mo. R. S. 1909 sec. 2344; N. Dak. Rev. Codes 1905 sec. 6639; S. Dak. C. C. 1908 sec. 2370; Okla. Comp. Laws 1909 sec. 2934; Wyo. Comp. Stats. 1910 sec. 4786.

to the sheriff of the county of ..... wherein said defendant then resided; and, that said execution was, on the .... day of ....., 19.., returned by said sheriff wholly unsatisfied [*or*, satisfied as to the sum of ..... dollars and unsatisfied as to the remainder of said judgment].

IV. That said judgment is still owned by plaintiff, and that there is now actually and equitably due thereon the sum of ..... dollars.

V. That on the .... day of ....., 19.., the defendant C.... D.... conveyed to the defendant E.... F.... the following described real property [*describe property*].

VI. That the defendant C.... D.... made said conveyance [without consideration and] with intent to hinder, delay and defraud plaintiff in the collection of his claim, and the same was received by the defendant E.... F.... with full knowledge of such intent.

[*In Wisconsin insert before demand for judgment:* VII. That this action is not commenced or prosecuted by collusion with the said C.... D.... or for the purpose of protecting the property or effects of the said C.... D.... against the claims of other creditors, but for the sole purpose of compelling payment and satisfaction of the plaintiff's own debt. *Wis. C. C. Rule XXVII sec. 2.*]

WHEREFORE plaintiff demands judgment that the said conveyance from the said C.... D.... to the said E.... F.... be adjudged null and void; that the said lands may be sold as provided by law, and the proceeds of such sale be applied to the payment of the plaintiff's said judgment; and for such other relief as may be equitable.

1655. The same, where plaintiff sues on behalf of himself and other judgment creditors.

The plaintiff, complaining on behalf of himself and all other judgment creditors of the defendant [whose executions have been returned unsatisfied, and] who shall in due time come in and seek relief by, and contribute to the expenses of this action, alleges:

I. [*Proceed substantially as in last preceding form.*]

1656. The same, upon a justice's judgment.

I. That on the .... day of ....., 19.., at ..... before

M.... N.... a justice of the peace in and for the town of ....., the plaintiff recovered a judgment, which was duly given by said justice, against the defendant C.... D.... for ..... dollars damages and ..... dollars costs, in an action wherein this plaintiff was plaintiff [*or*, defendant], and the defendant herein was defendant [*or*, plaintiff].

II. That on the .... day of ....., 19.., a transcript of the same was filed and docketed in the office of the clerk of the county of ..... [*if the judgment debtor resided in another county, add:* and on the .... day of ....., 19.., a transcript of the same was filed and docketed in the office of the clerk of the county of .....] in which county the defendant then resided [*or state ignorance of residence, etc., as in Form 1657*].

III. That on the .... day of ....., 19.., an execution in due form was issued upon the said judgment against the personal and real property of the defendant, to the sheriff of said [*last-mentioned*] county, in which county the defendant then resided.

[*Continue as in Form 1654.*]

1657. Against debtor to reach demands due from third persons.

I. That on the .... day of ....., 19.., at ..... in the ..... court in and for the county of ..... state of ..... the plaintiff recovered a judgment which was duly given by said court against the defendant [*if there were other judgment defendants add:* and M.... N.... and O.... P....] for ..... dollars in an action wherein this plaintiff was plaintiff [*or* defendant] and the defendant herein was [*or* the defendant herein and said M.... N.... and O.... P.... were] defendant [*or* plaintiff]; and that on the same day [*or*, the .... day of ....., 19..] said judgment was docketed in the office of the clerk of said county [and on the .... day of ....., 19.., a transcript thereof was filed, and the judgment docketed in the county of .....].

II. That on the .... day of ....., 19.., an execution in due form was issued upon the said judgment against the personal and real property of [all said debtors] to the sheriff of said [*last-mentioned*] county, in which county the defendant then resided [*or*, in which county was the defendant's

last known residence within this state, his residence at the time of said execution being unknown to the plaintiff, and not ascertainable, though the plaintiff made diligent inquiry therefor]; [*or* say: in which county was the defendant's residence at the time of bringing said action, his residence at the time of said execution being unknown to the plaintiff, and not ascertainable, though the plaintiff made diligent inquiry therefor].

III. That said execution has been returned by said sheriff wholly unsatisfied [*or*, unsatisfied except as to the sum of ..... dollars] and there is now actually and equitably due to the plaintiff on said judgment ..... dollars, with interest from the .... day of ....., 19..

IV. That a short time before the commencement of the action in which said judgment was obtained, and after the indebtedness on which said judgment is based had accrued, said defendant was and for several years previous thereto had been engaged in the mercantile business at ..... and [as plaintiff is informed and believes] various persons became indebted to him in large amounts; that although the said defendant, about the time or soon after the commencement of this action, to-wit, about the .... day of ....., 19.., did assign and transfer all his stock in trade to one M.... N...., yet the said business is still wholly unsettled; and that the defendant had at the time of the commencement of this action debts due him to a large amount, to-wit, to an amount not less than ..... dollars, a considerable portion of which are evidenced by charges on his books of account, which the said defendant refuses to produce, or allow to be examined by or on behalf of the plaintiff; and the plaintiff is therefore unable to specify, and cannot learn, and does not know, the particular items or amounts of said indebtedness, or the names of the several persons from whom the same are due; but is informed and believes that several of them, owing the defendant in the aggregate a sum not less than ..... dollars, reside at ..... and are solvent and able to pay the respective demands against them.

V. [*Where a debtor in the judgment is not made a defendant in this action because of insolvency or absence, add*]: That said [*insolvent or absentee*] is wholly insolvent and destitute of property [*or*, is not and has not been for the space of ....

within this state, but resides at ..... in the state of ..... and has no property within this state.

VI. [*Where a debtor in the judgment is not made a defendant because he was merely a surety, add*]: That the said judgment was recovered in an action [*describing it, e. g., thus*]: brought to foreclose a mortgage made by the defendant to said [*surety*] with a bond collateral thereto, and that said bond and mortgage was assigned to the plaintiff by the said [*surety*] who thereupon guaranteed the payment thereof; but the same not being paid, and the mortgaged premises being sold upon foreclosure in said action for less than the sum due, said judgment was recovered for the deficiency, as to which the said [*surety*] was merely a surety, and not liable as a principal debtor, and which it was, by a provision in said judgment, directed should be levied of the property of the defendant [*principal debtor*] if it could be so collected; and if it could not, then to be levied of the property of said [*surety*].

VII. [*In Wisconsin add allegation negativing collusion with the debtor, as in Form 1654.*]

WHEREFORE the plaintiff demands: (1) That the said defendant be adjudged to apply to the payment of the amount of said judgment and interest thereon, together with the costs of this action, said property, debts, choses in action, and equitable interests belonging to him, or held in trust for him, or in which he is in any way or manner beneficially interested. (2) That he be enjoined from selling, transferring, or interfering with said property, debts, things in action, and equitable interests. (3) That he be prohibited from making an assignment, or confessing any judgment, to enable other creditors or persons to obtain a preference over plaintiff, or to take any portion of defendant's property. (4) That a receiver may be appointed of all said property, equitable interests, things in action, and effects of the said defendant, and said defendant directed to execute to him an assignment thereof, and said receiver sell, or otherwise dispose of the same, and convert the same into money, as soon as may be, and that said receiver apply so much of the proceeds thereof as may be necessary for that purpose, to the payment of the plaintiff's said debt, with interest and costs of this action.

1658. Against the judgment-debtor, his assignee, and a pretended creditor named in the assignment, to set aside a general assignment for fraud extrinsic to the instrument.

I, II and III. [*Allege judgment and issue and return of execution, and amount due, as in Form 1654 or 1657.*]

IV. That after the contracting of the debt on which aforesaid judgment was recovered, said [*judgment-debtor*] assigned all his property to the defendant [*assignee*] in trust for the payment of his debts [*or* made an assignment of which a copy is annexed as a part of this complaint].

V. That the said [*assignee*] accepted the said trust, and has collected a large sum of money and other property from the assets of his assignors, amounting in all to the value of over ..... dollars.

VI. That the property so assigned is of the value of ..... dollars.

VII. That the said assignment was made by the said [*judgment-debtor*] with the intent to delay, hinder, and defraud his creditors; that it was not accompanied by an immediate and continued change of possession of the said property; that ever since the same was executed and delivered, and up to the present time, the said property has remained in the actual possession and under the control of said [*judgment-debtor*] who has retained possession and control thereof under the false and fraudulent pretence that he is agent of said [*assignee*].

VIII. That the pretended indebtedness set forth in said assignment as due from the defendant [*judgment-debtor*] to the defendant [*the preferred creditor*] is fictitious; that, in fact, no such indebtedness exists, but the same is therein inserted for the purpose of enabling the defendant [*judgment-debtor*] to distribute the proceeds of the goods passed under the assignment among his friends, and thereby to keep the possession and control thereof himself.

IX. That the defendant [*judgment-debtor*] has not any property other than that embraced in the assignment aforesaid, out of which the execution aforesaid could be satisfied in whole or in part; and that unless the said property can be reached and applied to the payment of said judgment, the same must remain wholly unpaid.

X. [*In Wisconsin add allegation negativing collusion, as in Form 1654.*]

WHEREFORE the plaintiff demands judgment: (1) That said assignment be adjudged fraudulent and void as against the plaintiff [and such other judgment-creditors of said *judgment-debtor* as shall elect to come in and share the expenses of this action]. (2) That a receiver of all the property and effects of said [*judgment-debtor*] be appointed. (3) That the defendants be adjudged to account for all the property received by them or either of them under said assignment, and for all proceeds arising from sale thereof, and deliver the same to such receiver. (4) That the defendants be, in the mean time, enjoined from disposing of any of said property, or paying away any of the proceeds thereof, or in any wise interfering therewith. (5) That said receiver pay, out of the proceeds of said property, the judgment aforesaid, and the costs and expenses of this action, and hold the balance subject to the further order of this court.

1659. To set aside an assignment which is void on its face.

I, II and III. [*Allege judgment and issue and return of execution, and amount due, as in Form 1654 or 1657.*]

IV. [*Allege making of assignment, setting it forth or annexing it, as in Form 1658, addding:*] And the plaintiff alleges and submits that the said instrument of assignment is fraudulent and void upon its face, for the reason that [*here set forth specifically the grounds of invalidity*], and he alleges that it was made and executed by the said defendant [*assignor*] [and accepted by the defendants, *assignees*] with the intent to hinder, delay and defraud the creditors of said [*assignor*].

[*Continue as in other forms.*]

1660. Against debtors who transferred their assets to a third person for his note, and assigned the note for benefit of creditors, seeking to set aside the transaction as fraudulent, and for a receiver.

I, II and III. [*Allege judgment and issue and return of execution, and amount due, as in Form 1654 or 1657.*]

IV. That on the .... day of ....., 19.., said [*judgment-debtors*] were booksellers at ..... doing business as partners under the firm-name of Y.... Z.... & Co.; and were possessed of [*designating the assets, e. g., thus*]: a large stock of books, stationery, fancy articles, jewelry, and musical publications, a valuable lease of their store, No. .... street, having five years to run, and sundry demands against other persons; but were insolvent and unable to pay their creditors punctually or in full.

V. That on that day, and after the indebtedness for which the plaintiff's judgment was recovered had accrued, the said defendants [*judgment-debtors*] in contemplation of, and with full knowledge of their insolvency, made a pretended sale of their said stock to the defendant [*transferee*] then a clerk in their employ in their said store, and took in payment therefor his promissory notes having several months to run, but for what exact amounts these plaintiffs do not know and cannot state.

VI. That the defendant [*clerk*] was wholly irresponsible, and insolvent, and has no means of paying his said notes except such moneys as he may derive from the sale of the property transferred to him as aforesaid.

VII. That thereafter and on the same day the said [*judgment-debtors*] executed and delivered to the defendants [*assignees*] an instrument in writing, of which the following is a copy [*copy assignment, or say*, of which a copy is annexed as a part of this complaint, *and annex a copy at the end of the complaint*].

VIII. That the property so assigned is of the value of about ..... dollars and upwards.

IX. That the said note to the said [*clerk*] and the said assignment to [*assignee*] were intended by each and all of the aforesaid defendants to be one transaction, and were in fact one transaction, and were intended and completed for the purpose of delaying, hindering, and defrauding the creditors of said [*judgment-debtors*] by putting it out of the power of such creditors to reach by execution, or other due process of law, the stock and assets of the said [*judgment-debtors*]; that such sale and assignment were not, nor was either of them, followed by immediate and continued change of possession; that ever since the said sale was made, and since said assignment was delivered, and up to the present time, the said

property has remained in the actual possession and under the control of the said [*judgment-debtors*] who have obtained possession and control thereof under the false and fraudulent pretence that they are agents of said [*clerk*].

[X. That said assignment is fraudulent and void upon its face, for the reason that, *specifying reason*].

XI. That the defendants [*judgment-debtors*] have not, nor has either of them, any property other than that embraced in the sale and assignment aforesaid, out of which the execution aforesaid could be satisfied in whole or in part, and that unless the said property can be reached and applied to the payment of said judgment, the same must remain wholly unpaid.

XII. [*In Wisconsin insert allegation negativing collusion, as in Form 1654.*]

WHEREFORE these plaintiffs demand judgment: (1) That the said sale by the defendants [*judgment-debtors*] to the said [*clerk*] and said assignment by the defendants [*judgment-debtors*] to the defendant [*assignee*] may each be declared fraudulent and void as against these plaintiffs. (2) That a receiver of all the property and effects of the said [*judgment-debtors*] or either of them, which they or either of them had at the time of the said sale to the defendant [clerk] or at any time thereafter, be appointed. (3) That the defendants, and each of them, be adjudged to account for all the property received by them, or either of them, under either the sale or assignment aforesaid, and for all proceeds arising from the sale thereof, and deliver the same to such receiver. (4) That the defendants, and each of them, be in the meantime enjoined from disposing of any of said property, or paying away any of the proceeds thereof, or in any wise interfering therewith. (5) That the said receiver be directed to sell the said property, or so much thereof as may be necessary, and to pay out of the proceeds of said property the judgment aforesaid, and the costs and expenses of this action, and hold the balance subject to the order of this court.

1661. Against debtor and his trustee, to reach the trust fund or its income.[2]

I, II and III. [*Allege judgment and execution and return unsatisfied, and amount due, as in Form 1654.*]

IV. That the defendant [*judgment-debtor*] is the beneficiary under a trust created by deed heretofore executed by him [*or*, created by the will of one M.... N.... deceased] of which a copy is hereto annexed as a part of this complaint.

V. That the fund, consisting of about the sum of ..... dollars, is now in the hands of the defendant [*trustee*] as trustee [*or* executor] and the defendant [*judgment-debtor*] is entitled to receive, or does receive annually, the sum of ..... dollars therefrom.

VI. [*If it is a trust under which the creditor can only reach surplus income, state facts to show what it is, e. g.*] that the defendant [*judgment-debtor*] is a man without family, and residing at ..... where he has been for the last three years, and still is, boarding, and the sum of ..... dollars annually is a reasonable sum for his support, and that the sum of ..... dollars annually is surplus income; *and if the creditor is only entitled to surplus accrued, add*: of which surplus ..... dollars is in the hands of the defendant [*trustee*] already accrued, but not paid over.

WHEREFORE the plaintiff asks that the defendants be enjoined respectively from paying over and from receiving said fund [*or*, so much of said income (already accrued) as is not necessary for the support of the defendant (*judgment-debtor*) and his family] and that the same be applied to the satisfaction of the plaintiff's judgment and interest, and the costs of this action.

1662. By an assignee of a judgment, against the judgment debtor and his mortgagee of personal property and an assignee to whom, by a fraudulent agreement between them, the debtor's property, including the mortgaged property, had been transferred.

I. That on or about the .... day of ....., 19.., at ..... in the ..... court, in and for the county of ..... one [*plaintiff's assignor*] recovered a judgment against [*the judgment-debtor*] for ..... dollars, which was duly given by

[1] See Scott v. Nevius, 6 Duer, 672; Shillick v. Mason, 2 Barb. Ch. 79; Havens v. Healy, 15 Barb. 296; Cruger v. Jones, 18 Barb. 467; Bramhall v. Ferris, 14 N. Y. (4 Kern.) 41.

said court, in an action [*continue as in Form 1657 to the end of paragraph III*].

IV. That on the .... day of ....., 19.., the said [*plaintiff's assignor*] duly assigned to the plaintiffs for a valuable consideration said judgment, and all rights arising therefrom.

V. That the said judgment was recovered upon debts of the said [*judgment-debtor*] contracted previous to the making of the transfer hereinafter mentioned.

VI. That the defendant [*judgment-debtor*] was a manufacturer of blank books and stationery at ..... and kept a store there stocked with blank books and stationery, and factory stocked with machinery and stock; the value of the said stock in the store being ..... dollars, and of the machinery and stock in the factory being ..... dollars, or thereabouts, the said machinery being subject to a chattel mortgage for ..... dollars, held by the defendants [mortgagees] under the firm name of S.... T.... & Co., the said W.... V.... being the active and managing partner of said firm.

VII. That subsequent to the contracting of said debts, and about the month of ....., 19.., the said [*judgment-debtor*] failed in business and stopped payment, and in anticipation of the said failure, and shortly previous thereto, he conspired with the defendant [*the managing partner of mortgagees*] and the defendant [*assignee*] to dispose of his property in fraud of his creditors, and to conceal or cover up the same, so that his creditors could not reach it; and, in pursuance of this scheme, and with intent to delay and defraud the said creditors, the said [*mortgagee*] and [*assignee*] mutually arranged and agreed that after the transfer should be made to said [*assignee*] as hereinafter mentioned, the said mortgage should be foreclosed, and the property sold and bid in by the said [*mortgagee*] and that the deficiency then existing between the amount of the mortgage and the price bid should be paid to him by the defendant [*assignee*] and the defendants [*debtor, mortgagee, and assignee*] further arranged and agreed that all the property in the said store and factory should be transferred and delivered to the defendant [*assignee*] at the nominal price of ..... dollars, or thereabouts, which the said [*assignee*] should pay in notes, and [*the debtor*] should use in effecting favorable compromises

with his creditors. And it was further arranged and agreed between the defendants that the defendant [*assignee*] should go on, in his own name, with the business previously conducted by [*the debtor*] and should employ said [*debtor*] as managing agent, at a nominal salary of ..... dollars a year; that the business should be thus continued for two years, to give said [*debtor*] an opportunity to buy up at a low rate the claims against him held by his creditors, and at the end of that time said [*assignee*] should pay over and deliver to the debtor all the residue of said property and effects, and the proceeds and profits thereof, after deducting ..... dollars a year for his own compensation and the amount of the notes given as aforesaid by him. And it was further arranged and agreed that if the defendant [*debtor*] could procure a purchaser of said property at a fair price, the said [*assignee*] should sell the same to such purchaser in his own name, and after making the deduction above mentioned should pay over the balance to said [*debtor*].

VIII. That in pursuance of this arrangement the defendant [*mortgagee*] foreclosed the mortgage and bought in the property at ..... dollars, and immediately transferred the same to said [*assignee*] who paid him ..... dollars therefor, that being the amount of said mortgage; which amount the said [*mortgagee*] received for, and paid over to, the said firm of S.... T.... & Co.

IX. That also, in pursuance of said arrangement, the other property of said [*debtor*] in the factory and store was transferred by him to said [*assignee*] for ..... dollars, paid in notes as aforesaid, who continued the business, employing said [*debtor*] as managing agent, and the said [*assignee*] has made a large profit thereon, and at least ..... dollars a year; and that the said [*assignee*] still continues in said business, and in possession of the said goods and property, or the proceeds and profits thereof.

X. [*Negative collusion, as in Form 1654.*]

WHEREFORE the plaintiffs demand judgment: (1) That the transfer of his property by the defendant [*debtor*] to the defendant [*assignee*] may be adjudged fraudulent and void as against the plaintiffs. (2) That the said defendant [*assignee*] be enjoined and restrained from selling, assigning, or in any way disposing of the machinery and stock in said blank book manufactory, transferred to him

by said [*debtor*] or said [*mortgagee*] and the goods and stock in the store transferred to him by said [*debtor*] or the proceeds and profits thereof. (3) That a receiver may be appointed to take possession of the said property, and the proceeds and profits thereof. (4) That the said W.... V.... may be compelled to account to said receiver for the profits of said store and manufactory since the said transfer. (5) That the said [*mortgagees*] be compelled to pay over to said receiver ..... dollars, being the sum received by them over and above the amount that the mortgaged machinery brought at the sale. (6) That the property taken possession of by said receiver, or collected by him, may be sold and appropriated to the payment of the judgment held by the plaintiffs. (7) And for the costs of this action.

1663. Against judgment-debtor and one to whom he fraudulently confessed judgment, to set aside judgment and sale thereunder.

I, II and III. [*Allege judgment and execution and return unsatisfied, and amount due, as in Form 1654.*]

IV. That prior to the entry of said judgment, but after the indebtedness upon which the said judgment was rendered had accrued, the said defendant [*debtor*] authorized a judgment to be entered, on confession, in the ..... court for ..... county against him, in favor of the defendant [*fraudulent creditor*] the father of said [*debtor*] for ..... dollars damages and ..... dollars costs, for a pretended indebtedness for so much money alleged to have been theretofore lent by said defendant [*debtor*] to said defendant [*fraudulent creditor*].

V. That thereafter, and about the .... day of ....., 19.., execution having been issued upon the said judgment, personal property of said [*debtor*] consisting of [*briefly describing it*] of the value of ..... dollars was thereunder sold by public auction by the sheriff of the said county of ..... and was struck off to said defendant [*fraudulent creditor*] at about ..... dollars, a sum far less than its real value; who thereupon took possession, and is now in possession of the same, claiming to be the owner thereof.

VI. That afterwards, and about the .... day of ....., 19.., real property of said [*debtor*] consisting of [*briefly de-*

scribing it] was sold by auction by the sheriff of said county under an execution issued upon said judgment, and was struck off to the said defendant [*fraudulent creditor*] also at a price much below its real value, his being the highest bid for the same; and the said sheriff, thereupon made his certificate of sale of the said real estate, to-wit, on the .... day of ....., 19.., aforesaid [and no deed or conveyance has yet been given by him, the time for such conveyance having not yet expired].

VII. That the said last-mentioned judgment was fraudulently confessed by the said [*debtor*] to the said [*fraudulent creditor*] and for the purpose of covering up his said property, and defrauding the plaintiff in the collection of his demand. That said defendant [*debtor*] was not indebted to the defendant [*fraudulent creditor*]; but said judgment was confessed without any consideration, and the sale of said property was made with the intention, on the part of both, of defrauding the plaintiff out of his demand, and of transferring the ostensible ownership and possession of the property of said [*debtor*] liable to execution, to the said defendant [*fraudulent creditor*] so as to prevent the plaintiff, or any other creditor, from levying upon and selling any part thereof.

[VIII. That said real estate cannot be sold for more than about one-half the amount of the plaintiff's said judgment; and that the said defendant [*fraudulent creditor*] is of no pecuniary responsibility, and is possessed of little or no property other than that so bid in by him as aforesaid, and is in embarrassed circumstances and involved in debt.]

IX. [*In Wisconsin negative collusion, as in Form 1654.*]

WHEREFORE the plaintiff demands judgment against the defendant:. (1) That the said judgment in favor of the defendant [*fraudulent creditor*] and the proceedings and sale under it, and the sheriff's certificate of sale, be set aside, and declared void. (2) That the said defendants, and each of them, be enjoined from disposing of, transferring, incumbering, or in any way interfering with the said property, or any part thereof; and that a receiver be appointed, with the usual powers and duties, to whom the said defendants shall be directed to assign the said property, real and personal, [and all other estate, property and effects of said defendant, *debtor*] and who shall be authorized and directed to sell the same, or so much thereof as shall be necessary for that pur-

pose, and apply the proceeds, or so much thereof as may be necessary, to the payment of the plaintiff's said judgment, and interest thereon. (3) And for the costs of this action; and for such other or further relief as may be just.

1664. Complaint by two creditors suing together, against debtor and his fraudulent grantee, to set aside conveyance of real estate (adapted from the complaint in Gates v. Boomer, 17 Wis. 455).

I, II, III and IV. [*Allege the obtaining of judgment and issue and return of execution, and amounts severally due to each of the plaintiffs, as in Form 1654.*]

V. That on and prior to the .... day of ....., 19.. [*date of the fraudulent deed*] the said defendant C.... D.... was the owner in fee simple of the following described parcel of land in said district, and that on the last named date the said C.... D.... by warranty deed sold and conveyed the said land to the defendant E.... F.... without consideration, and the said defendant E.... F.... then and there accepted and received said deed and caused the same to be recorded in the office of the register of deeds of said county of ..... on the .... day of ....., 19..

VI. That on or about the said .... day of ....., 19.., said defendant C.... D.... also assigned and conveyed to the said E.... F.... a large amount of personal property of great value, embracing all that was then owned by the said C.... D.... within this state not exempt from seizure and sale on execution, and that since said conveyances and transfers the said C.... D.... held and owned no real or personal estate within this state subject to execution, unless the legal title thereto has been vested in some other party, or unless the same has been so secreted as to render it unavailable for the purpose of satisfying any judgment recovered against the said C.... D....

VII. That the lands so conveyed as aforesaid were and are of great value, and more than sufficient for the payment and satisfaction of the demands of the plaintiff hereinbefore set forth, and that at the time of the execution of the conveyances and transfers of property before mentioned the said C.... D.... was and had been for a long time a resident of the said county of .....; that shortly thereafter

said C.... D.... absconded from said county of ....., and has not since had any known place of residence within this state.

VIII. That, as plaintiff is informed and believes, the said sale and conveyance of said land, and the transfer of said personal property by the said C.... D.... to the said E.... F.... as hereinbefore mentioned, were both made by the said C.... D.... with intent to hinder and delay and defraud his creditors, including the plaintiffs, of their lawful debts and demands, of which fraudulent intent the said E.... F.... had notice before the making of said conveyance and transfers, and that the said E.... F.... took and accepted said conveyance and transfer for the purpose of assisting the said C.... D.... in his fraudulent intent to hinder, delay, and defraud his creditors, as aforesaid.

WHEREFORE [*demand for judgment as in Form 1654*].

1665. By attaching creditor in aid of writ of attachment against fraudulent grantee, to set aside deed of real estate (adapted from Evans v. Laughton, 69 Wis. 138; 33 N. W. 573).

I. That the said plaintiff has a valid claim against one L.... M.... in the sum of ..... dollars, and that an action is now pending in the ..... court for ..... county in said state, in which the plaintiff herein is the plaintiff and the said L.... M.... is defendant, for the recovery of the said claim, and that the summons in said action has been served on the said L.... M...., and that the complaint therein is now on file in this court.

II. That a writ of attachment was duly issued out of this court on the .... day of ....., 19.., in said action in favor of this plaintiff and against said L.... M...., and that by virtue of said writ the sheriff of said ..... county on the .... day of ....., 19.., levied upon certain lands in said county described as follows [*description*] and that this plaintiff has and owns by virtue of said writ of attachment and levy thereunder, a lien upon said land.

III. That the said L.... M.... has no other land or property within this state, as the plaintiff is informed and believes, out of which the plaintiff can realize his said claim.

IV. That, as the plaintiff is informed and believes, the

said L.... M...., on the .... day of ....., 19.., and after the claim of the plaintiff hereinbefore mentioned had accrued, conveyed by warranty deed to the defendant C.... D.... the said land hereinbefore described, which deed was recorded in the office of the register of deeds of ..... county, on the .... day of ....., 19..

V. That, as the plaintiff is informed and believes, the said conveyance was executed by the said L.... M.... without consideration, and with intent to hinder, delay and defraud the creditors of the said L.... M.... including this plaintiff, and that the said defendant C.... D.... accepted and received said deed with knowledge of the said fraudulent intent on the part of the said L.... M.... and with intent upon his part to assist the said L.... M.... in his said fraudulent purpose, and to hold the said lands as a secret trust for the said L.... M....

VI. That there is now actually and equitably due the plaintiff upon his said demand the sum of ..... dollars, with interest from ....., 19..

VII. [*In Wisconsin insert allegation negativing collusion, as in Form 1654.*]

WHEREFORE the plaintiff demands judgment that the said deed may be set aside and adjudged fraudulent and void, and that the land therein described be adjudged subject to the lien of the plaintiff's writ of attachment aforesaid; and that the plaintiff have such other and further relief in the premises as shall be just and equitable, with costs.

1666. By judgment creditor against debtor and fraudulent grantee, to set aside fraudulent transfer of personal property (adapted from complaint in Pierstorff v. Jorges, 86 Wis. 128; 56 N. W. 735).

I, II, III and IV. [*As in Form 1654.*]

V. That, as plaintiff is informed and believes, the defendant C.... D.... was, on the .... day of ....., 19.., and for some time prior thereto, the owner of the following described personal property, to-wit [*describe tangible property conveyed*] and that said defendant at the same time was the owner of a considerable number of accounts, debts, claims and demands due him from different persons whose names

are to this plaintiff unknown, and that the value of all of said personal property was about the sum of ..... dollars.

VI. That on or about the said .... day of ....., 19.., after the commencement and immediately before the trial of the said action hereinbefore mentioned, the said defendant C.... D.... fraudulently, and with intent to hinder, delay and defraud his creditors, including this plaintiff, and to prevent the collection of any judgment which might be recovered in said action, executed a bill of sale of the said personal property, accounts and demands hereinbefore described, which property constituted all of the property owned by the said C.... D.... exempt from execution, to the defendant E.... F.... upon the alleged and pretended consideration of ..... dollars. That, as the plaintiff is informed and believes, no consideration was in fact paid by the said E.... F.... to the said C.... D.... for the transfer of the said personal property, and that the said bill of sale was executed by the said C.... D.... solely with intent to hinder, delay and defraud his creditors, and especially this plaintiff. That the said transfer was not accompanied by an immediate and continued exchange of possession of the said property, and that since the said transfer and up to the present time the said property has remained in the actual possession and under the control of the said C.... D...., under the false and fraudulent pretense that he is the agent of the said E.... F.... That the said E.... F.... at the time of said transfer well knew the fraudulent purpose of the said C.... D...., and accepted the said bill of sale with the fraudulent intent to aid and assist the said C.... D.... in his said fraudulent purpose, and especially with intent to prevent the plaintiff from collecting any judgment which he might recover in said action.

VII. That, as the plaintiff is informed and believes, the said defendant C.... D.... had not at the time of the making of the said bill of sale and has not since had, and has not now any other property than that embraced in the said bill of sale whatever, out of which the plaintiff's judgment can be satisfied in whole or in part, and that unless the said property can be reached and applied to the payment of said judgment the same must remain wholly unpaid.

VIII. [*In Wisconsin add allegation negativing collusion, as in Form 1654.*]

WHEREFORE the plaintiff demands judgment that a receiver of all the property and effects of the said C.... D.... be appointed; that the said pretended bill of sale of said personal property may be declared null and void as against this plaintiff; and that the said property may be transferred to such receiver. That the defendants be required to account for all the moneys collected by them, or either of them, upon the accounts and demands aforesaid, and for all the proceeds arising from the sale of any of such property and pay over the same to such receiver in order that the same may be applied upon the plaintiff's said judgment. That said defendants be enjoined from disposing of any of such property, or collecting any of said accounts, and that the said receiver be ordered to take possession of and sell all the property of said C.... D.... not exempt from sale on execution, or so much thereof as may be necessary, and apply the proceeds thereof to the payment of the amount due on said judgment, as aforesaid; and that the plaintiff recover his costs and disbursements.

1667. By judgment creditor against the debtor, his wife, two other fraudulent grantees of personal property, and a banking corporation, to reach concealed personal property and moneys (adapted from the complaint sustained in Gullickson v. Madsen, 87 Wis. 19; 57 N. W. 965).

I, II, III and IV. [*Allege recovery of judgment of the plaintiff, issue of execution and return, and amount actually due, as in Form 1654.*]

V. That the defendant, Bank of ..... is and was at the times hereinafter mentioned, a banking corporation duly organized and existing under and by virtue of the laws of the state of ..... [*or the laws of the United States*] and doing business at the city of ..... in said county of .....

VI. That on the .... day of ....., 19.., the defendant C.... D.... was the owner and in the possession of certain saloon furniture and fixtures situated in the city of ..... county of ..... free of incumbrances, which furniture and fixtures were reasonably worth the sum of ..... dollars, and that on the said last mentioned day, as plaintiff is informed and believes, the said C.... D.... made, executed

and delivered to the defendant E.... F.... a chattel mortgage covering the said furniture and fixtures purporting to secure the payment of the sum of ..... dollars and caused said mortgage to be filed in the office of the city clerk of the city of ..... on the .... day of ....., 19.., which mortgage now appears to be unsatisfied upon the records of said city clerk; that, as plaintiff is informed and believes, the said mortgage was in fact executed and delivered without any consideration whatever, and solely for the purpose of hindering, delaying and defrauding this plaintiff in the collection of his said claim against the said C.... D....

VII. That the defendant G.... H.... is the wife of the defendant C.... D...., and at the times named in this complaint had no separate estate; that the defendant C.... D.... has for many years made regular deposits in the banking house conducted by the said defendant, the Bank of ..... aforesaid, and that since the indebtedness to the plaintiff hereinbefore mentioned accrued, the defendant C.... D.... has regularly and systematically made and now makes, his deposits in the said bank in the name of his said wife G.... H....; that the said G.... H.... does not in fact handle or control any of said money; but that the same is withdrawn from the said bank on checks of the said C.... D.... as agent for the said G.... H...., which method the said C.... D.... has resorted to solely for the purpose of defrauding, hindering and delaying his creditors, and this plaintiff in particular, in the collection of their just claims; that the said defendant, the Bank of ..... as the plaintiff is informed and believes, now has in its possession and under its control moneys, credits and effects belonging to the defendant C.... D...., but which are deposited in the name of the defendant G.... H.... and that the same are so credited and deposited for the sole purpose of hindering, delaying and defrauding the creditors of the said C.... D....; that the said Bank of ..... is now owing the said C.... D.... upon certificates of deposit issued either to said C.... D.... or to the said G.... H...., and that the value of the property and credits of the said C.... D.... so held by the said bank, and the indebtedness of the said bank to the said C.... D.... upon certificates of deposit as aforesaid, exceeds the sum of ..... dollars, as plaintiff is informed and believes.

VIII. That the said C.... D.... has no other property other than that hereinbefore mentioned whatever, out of which the plaintiff's judgment can be satisfied in whole or in part, and that the said C.... D.... unjustly refuses to apply any of the aforesaid property in satisfaction of said judgment.

IX. [*In Wisconsin insert allegation negativing any collusion, as in Form 1654.*]

WHEREFORE plaintiff demands judgment that the said defendant C.... D.... be enjoined from selling or disposing of any money, property, debts, choses in action, or equitable interests belonging to him or held in trust for him, or in which he is in any way interested, and that he be adjudged to apply the same upon the judgment of the plaintiff hereinbefore mentioned; that the chattel mortgage hereinbefore mentioned, executed to the defendant E.... F.... be declared fraudulent and void, and that the same be cancelled, and that the property therein described be adjudged to be the property of the defendant C.... D....; that the defendant C.... D.... be ordered to appear before the ..... court or a judge thereof, and under oath disclose and answer as to any and all property in which he may be beneficially interested; that the defendant E.... F.... be enjoined from disposing of or selling any of said property described in said mortgage; that the defendant Bank of ..... be enjoined from making any payment upon the certificates of deposit aforesaid, or from paying out or disposing of any property, money or credits held by said bank to the credit of the said G.... H.... or to the credit of the said C.... D....; and that the defendant G.... H.... be enjoined from disposing of any of the property, money, credits or effects held by her as aforesaid; that a receiver of the property of the said C.... D.... be appointed by this court, with the usual powers of a receiver in such cases; and that the plaintiff have such other relief as may be equitable, with costs.

1668. By judgment creditor to set aside conveyance made prior to the creation of the indebtedness due to the plaintiff (adapted from complaint in Shand v. Hanley, 71 N. Y. 319).

I, II, III and IV. [*As in Form 1654.*]

V. That on the .... day of ....., 19.., and for several years prior thereto the defendant C.... D.... was the owner and in possession of the following described lands [*insert description*], and that said lands were and still are of the value of about ..... dollars, and were exempt from sale upon execution.

VI. That by reason of the fact that the said C.... D.... owned the said lands said C.... D.... was enabled to and did obtain credit in his business as a merchant, and that many persons including this plaintiff, sold and delivered to the said C.... D.... goods, wares and merchandise believing the said C.... D.... to be solvent and relying upon the fact of his ownership of the said real estate.

VII. That on the .... day of ....., 19.., the defendant C.... D.... secretly conveyed the said lands by warranty deed to the defendant E.... F.... without consideration, and for the purpose of hindering, delaying and defrauding his existing creditors, as well as the creditors who might thereafter extend credit to him in the prosecution of his said business, which intention was well known to the said defendant E.... F.... and participated in by him; that after the execution of the said conveyance the said defendant C.... D.... remained in continuous possession of the said premises, and in apparent ownership thereof, and that by reason of the said continuous possession and apparent ownership, the credit of the said C.... D.... was continued, and this plaintiff, relying upon said apparent ownership and possession of said property continued to extend credit to the said C.... D.... and allowed him to contract the indebtedness hereinbefore set forth on account of which the said judgment was rendered.

VIII. [*In Wisconsin insert an allegation negativing collusion, as in Form 1654.*]

WHEREFORE plaintiff demands judgment that the said conveyance by the said C.... D.... to the said E.... F.... be adjudged void as to this plaintiff [*continue as in Form 1654.*]

1669. By creditor to reach salary due the debtor (adapted from complaint sustained in Kingman v. Frank, 33 Hun, 471).

I, II, III and IV. [*Allege judgment, execution and return, and amount due, as in Form 1654.*]

V. That, as plaintiff is informed and believes, on or about the .... day of ....., 19.., the defendant E.... F.... agreed to and did employ the defendant C.... D.... [*judgment-debtor*] to manage a certain mercantile business conducted by said E.... F.... at the city of ....., and agreed to pay the said C.... D...., in consideration thereof, the sum of ..... dollars per month; that the said C.... D.... thereupon entered upon the said employment, and conducted the said business in accordance with said agreement, but that said defendant E.... F.... has failed to pay to the said C.... D.... the said sum of ..... dollars per month, as agreed, and has only paid about the sum of ..... dollars, and that there is now due from the said E.... F.... to the said defendant C.... D.... on account of his services so rendered the sum of ..... dollars.

VI. That the defendant C.... D.... has no property, real or personal, upon which execution can be levied for the payment of the plaintiff's said judgment, and that he wrongfully refuses to apply any part of his said salary to the satisfaction thereof.

VII. [*In Wisconsin add allegation negativing any collusion as in Form 1654.*]

WHEREFORE plaintiff demands judgment that a receiver may be appointed; that the defendant E.... F.... be required to pay the amount due from him to the said defendant C.... D.... as aforesaid, to the said receiver; and that the plaintiff's demand may be satisfied therefrom; and that this plaintiff have such other and further relief as may be proper, with costs.

1670. By judgment creditor, to reach royalties falling due from publishers to the debtor under a contract (adapted from Lord v. Harte, 118 Mass. 271).

I, II, III and IV. [*As in Form 1654.*]

V. That the defendant C.... D.... [*debtor*] is and has been for many years an author of large reputation, and has written and caused to be published works in prose and poetry which have had and still have a large and profitable sale in

the United States and elsewhere and that many of said works are now being published by the defendants O.... & Co.; and upon information and belief the plaintiff alleges that the said defendant C.... D.... has assigned to the defendants O.... & Co., the copyrights of the said books, and the sole right to publish and sell the same, in consideration of a certain written contract by the terms of which contract the said O.... & Co., in consideration of the assignment to them of said copyrights, agree to publish and sell as many copies of said books as can be advantageously sold during the life of said copyrights and out of such sales pay to the said C.... D...., ... per centum upon the retail prices of said books as compensation for the authorship thereof, such compensation to be paid upon the stating of semi-annual accounts in the months of May and November of each year.

VI. That under the terms of said contract the said C.... D.... has already received large sums as royalties, and more than enough to pay the plaintiff's said judgment; that the sale of said books is large and continuous and that the profits of the said C.... D.... under said contracts will continue for many years, but that the said C.... D.... refuses to apply any part of the sums so received by him to the payment of plaintiff's judgment, and the same cannot be reached by attachment or execution. That the amount due the defendant C.... D.... upon a proper accounting from the defendants O.... & Co., at the time of the commencement of this action, or at the time of the first accounting thereafter, will not be sufficient to discharge the plaintiff's said judgment.

VII. [*In Wisconsin add allegation negativing collusion as in Form 1654.*]

WHEREFORE plaintiff demands judgment that an accounting be had, and that the sums due and hereafter to become due from the defendants O.... & Co., to the defendant C.... D.... be ascertained; that a receiver be appointed, with the usual powers; that the defendants O.... & Co., be adjudged to pay over to said receiver the said sums so due or hereafter becoming due under said contracts to said C.... D.... until the said judgment, with interest and the costs of this action, be fully discharged; and that the plaintiff have such other and further relief as may be just and equitable.

1671. By assignee in bankruptcy to recover unlawful preference, or its value.[3]

I. That heretofore and on the .... day of ....., 19.., one L.... M.... of ..... duly filed his petition in the United States district court for the ..... district of ..... praying that he be adjudged a bankrupt pursuant to act of congress, and that pursuant to such petition said L.... M.... was by said court on said day duly adjudged a bankrupt; that thereafter and on the .... day of ....., 19.., this plaintiff was duly elected and appointed by the creditors of said L.... M.... as trustee in said bankruptcy proceedings, and such election was duly approved by I.... K.... referee in bankruptcy, before whom said proceedings were pending; that thereupon the plaintiff duly qualified as such trustee by giving the bond required by said court and taking the oath required by law, and entered upon his duties as trustee and brings this action in such capacity.

II. [*Set forth the property owned by the bankrupt during the four months preceding the filing of the petition, the indebtedness of the bankrupt to the defendant and the transfer within the four months of certain of the property, describing it, to the defendant for the purpose of giving him a preference, and the knowledge of the defendant of such purpose.*]

WHEREFORE, etc. [*The demand for judgment should be for the return of the property or its value.*]

1672. By administrator or executor to reach property fraudulently conveyed by his intestate, or testator.[4]

I. That one L.... M...., of ....., in the county of ..... in said state, died on the .... day of ....., 19.., a resident of said county, and that this plaintiff was on the .... day of ....., 19.., by the ..... court of .....

[3] This action may be brought by the trustee in bankruptcy under the Bankruptcy Act (U. S. Act of July 1, 1898, sec. 60 subd. *b*; U. S. Comp. Stats. 1901 p. 3405). It is not necessary to allege that any creditors had filed claims in the bankruptcy proceedings, nor that it is necessary for the payment of debts that the alleged preference be recovered. Jackman v. Bank, 125 Wis. 465; 104 N. W. 98.

[4] This action is authorized by Wis. Stats. 1913 sec. 3832, (See Andrew v. Hinderman, 71 Wis. 148; 36 N. W. 624.); Ariz. R. S. 1913 sec. 974; Ark. Dig. of Stats. 904 sec. 81; Cal. C. C. P. 1906 sec. 1589;

county duly appointed administrator of the estate of said L.... M.... deceased, and has duly qualified as such administrator, and is now acting as such. [*If the action is brought by an executor, substitute for paragraph I here paragraph II, Form 853.*]

II. That for many years prior to the death of said L.... M...., and up to the date of the conveyance hereinafter set forth, he owned and was in possession of the following described real estate [*describe property*].

III. That on the .... day of ....., 19.., the said deceased executed and delivered to the defendant C.... D.... a warranty deed of said real estate which deed upon its face purported to have been executed in consideration of the payment of the sum of ..... dollars, but as plaintiff is informed and believes, no consideration was in fact paid therefor, but that the same was executed and delivered with intent on the part of said L.... M.... to hinder, delay and defraud his existing creditors, of which intent the defendant C.... D.... was fully advised at the time he received said conveyance.

IV. That on and prior to said .... day of ....., 19.. [*date of conveyance*] said L.... M.... was justly indebted to X.... Y...., Y.... Z...., and various other persons, in large amounts, aggregating in all about the sum of ..... dollars, which debts remained unpaid at the time of the death of said L.... M...., all of which debts will, as plaintiff is informed and believes, be proved and allowed against the estate of said L.... M.... [*or, if claims have already been allowed:* and that there have already been proven and allowed by said court of the said debts so owing by said deceased claims amounting in the aggregate to the sum of ..... dollars].

V. That the net amount of the assets of the estate of said deceased which has come into the possession or knowledge of the plaintiff as administrator aforesaid does not exceed the sum of ..... dollars, and that there will be a deficiency of

Idaho Rev. Codes 1908 sec. 5558; Iowa Ann. Code 1897 sec. 3317; Mont. Rev. Codes 1907 sec. 7611; Minn. Gen. Stats. 1913 sec. 7313; Neb. R. S. 1913 sec. 1375; N. Dak. Rev. Codes 1905 sec. 8173; S. Dak. Prob. C. 1903 sec. 250; Okla. Comp. Laws 1909 sec. 5355; Oregon Laws 1910 sec. 1279; Utah Comp. Laws 1907 sec. 3922; Wash. Rem. and Bal. Code 1910 sec. 1540; Wyo. Comp. Stats. 1910 sec. 5571.

assets to pay the just debts chargeable against said deceased, amounting to at least the sum of ..... dollars.

VI. That the defendant threatens and is about to convey said lands to some innocent purchaser for value, without notice, and that if he should make such conveyance the estate of the said L.... M.... would be and remain insolvent, and the said creditors would thereby lose all or a large portion of their just demands.

WHEREFORE plaintiff demands judgment that the said deed be declared void and cancelled; that the said defendant C.... D.... be adjudged to reconvey said lands to this plaintiff, as administrator [*or* executor] aforesaid; and that the plaintiff have such other and further relief as may be just and equitable, with costs.

1673. By creditor against administrator and grantee of deceased debtor, when estate is insufficient to pay claims proven.[5]

The plaintiff, on behalf of himself and all other creditors of L.... M.... deceased who are similarly circumstanced, complaining of the defendants C.... D.... and E.... F...., respectfully alleges:

I. That one L.... M...., of ....., died intestate on the .... day of ....., 19.., and that on the .... day of ....., 19.., upon proceedings duly had in that behalf, the defendant E.... F.... was by the ..... court of said ..... county duly appointed administrator of the estate of said L.... M.... deceased, and thereafter duly qualified and entered upon the duties of said office, and is now such administrator.

II. That on the .... day of ....., 19.., the said E.... F...., as administrator aforesaid, duly made and returned into said ..... court an inventory of all the real and personal property of said L.... M...., and that the property included in said inventory was duly appraised as required by

[5] This action may be brought by a creditor who has obtained judgment, or whose claim has been allowed by the county court. Wis. Stats. 1913 sec. 3835. It may be brought whenever there is just reason to anticipate that the estate will be insufficient to pay debts, but it can not be brought to trial until the insufficiency of the estate is judicially ascertained by the county court. Wis. Stats. 1913 sec. 3836; German Bank v. Leyser, 50 Wis. 259.

law, and that the entire amount of the property, real and personal, belonging to said estate, does not exceed in value the sum of ..... dollars, being the amount at which the same was appraised, as plaintiff is informed and believes.

III. That the said deceased, at the time of his death was justly indebted to this plaintiff in the sum of ..... dollars, upon a certain promissory note of said deceased and that the said claim was duly presented to the court aforesaid for allowance against said estate, and was duly allowed by said court on the .... day of ....., 19.., at the sum of ..... dollars; and that the following claims against said estate were also duly presented to and allowed by said court prior to the commencement of this action, to-wit [*give names and the amounts of claims allowed*].

IV. That there is just reason to believe, and this plaintiff does believe, that the entire estate of the said L.... M.... as set forth in said inventory will be insufficient to pay the debts of the said intestate.

V. That at the time of the contracting of the said indebtedness owing by the said deceased to this plaintiff, as well as to the other creditors aforesaid the said L.... M.... was the owner and in possession of [*here describe property fraudulently conveyed*] and that on or about the .... day of ....., 19.., the said L.... M...., without consideration and with intent to hinder and delay his said creditors, conveyed by warranty deed [*or, if personal property:* by bill of sale] the said property, to the defendant C.... D.... who well knew the said fraudulent intent of said L.... M.... and participated therein, and that the said property is now in the possession of the said C.... D.... who claims title thereto and threatens to convey and dispose of the same.

V. That there is no property, real or personal, belonging to said estate which can be applied to the payment of said debts, except the property inventoried as aforesaid, and the property so conveyed to said C.... D....

WHEREFORE plaintiff demands judgment that said defendant C.... D.... be enjoined and restrained from selling or disposing of the said [*describe property*]; that he is required to convey [and deliver] the same to said administrator, and that said administrator be directed to sell the same and apply the proceeds to the payment of the debts

of said estate, and for such other relief as may be just and equitable, with costs.

1674. By creditor of deceased debtor, to reach land purchased by the debtor, but conveyed to a third person in fraud of creditors (adapted from complaint sustained in Allen v. McRae, 91 Wis. 226; 64 N. W. 889).

The plaintiff, on behalf of himself and all other creditors of L.... M...., deceased, who are similarly circumstanced, complaining of the defendant C.... D...., respectfully alleges:

I. That one L.... M...., of ....., in the county of ....., being at the time wholly solvent and indebted to this plaintiff and others, did on the .... day of ....., 19.., purchase of one O.... P.... the following described real estate [*describe the property*].

II. That the said L.... M.... paid from his own moneys the entire consideration for the said real estate, and caused the title thereof to be conveyed to the defendant C.... D.... by warranty deed, in usual form, whereby the said C.... D.... became vested with the legal title to said property; that the said conveyance to the said C.... D.... was made and intended to be in secret trust for the sole use and benefit of the said L.... M...., pursuant to an agreement between the said L.... M.... and the said C.... D...., and with intent on the part of both said L.... M.... and said C.... D.... that the said property should be held by the said C.... D.... in trust for the said L.... M.... so that it should not be subjected to the payment of the debts of the said L.... M....; that the legal title to said land has continued to remain in the said L.... M.... by virtue of the said conveyance ever since the date thereof, and still so remains.

III. That the said L.... M...., at the time of said conveyance was indebted to this plaintiff in the sum of ..... dollars, and was also indebted to divers other parties, to an amount aggregating about the sum of ..... dollars, and continued to be so indebted until the time of his death, which death occurred on the .... day of ....., 19..

IV. That on the .... day of ....., 19.., the defendant E.... F...., upon proceedings duly had for that purpose, was appointed by the ..... court of ..... county, administrator of the estate of the said L.... M.... deceased, and duly qualified as such administrator, and ever since has been such administrator; that on the .... day of ....., 19.., this plaintiff duly filed in the said ..... court her claim as creditor aforesaid against the estate of the said L.... M...., which claim was duly allowed by said court at the sum of ..... dollars, on the .... day of ....., 19..

V. That no funds belonging to said estate have come into the hands of the said administrator, and that there is no property in the possession of said administrator, or within his knowledge, out of which this plaintiff can collect his said claim.

VI. That on the .... day of ....., 19.., an execution was duly issued out of the ..... court of ..... county, upon a judgment in a certain action in which Y.... Z.... was plaintiff and L.... M.... was defendant, and that on the .... day of ....., 19.., said execution was duly returned wholly unsatisfied, and that this plaintiff brings this action on behalf of himself and all the creditors of said L.... M.... whose claims existed at the time of the conveyance of said real estate to the defendant C.... D...., to-wit, on the .... day of ....., 19..

WHEREFORE the plaintiff demands judgment that the defendant C.... D.... be adjudged a trustee of said land for the benefit of this plaintiff and the other creditors of the said L.... M.... existing at the time of said conveyance, and that the court appoint a receiver to sell said property, or so much thereof as may be necessary to pay said creditors, and that the said C.... D.... be required to account for the rents and profits of said real estate to said receiver from the time of said conveyance if the same shall be necessary to pay the claims of said creditors, with interest, and that the plaintiff have such other or further relief as may be equitable, with costs.

1675. Complaint by a judgment creditor against insolvent corporation and its officers, to reach unpaid stock subscriptions and corporate assets fraudulently conveyed by the officers to themselves (adapted from complaint sustained in Pierce v. Milwaukee Construction Co., et al., 38 Wis. 253).

I, II, III and IV. [*As in Form 1654.*]

V. [*Allege corporate character and business of the corporation defendant.*]

VI. The plaintiff further alleges, upon information and belief, that the said defendant [*name corporation*] is possessed of or entitled to real and personal property, evidences of debt or things in action which are held for it by some or all of the remaining defendants named in this complaint in secret trust or under some colorable title for its benefit, but which is under the control and direction of the said corporation under some parol or written agreement which the said corporation refuses to disclose to the plaintiff.

VII. That, as the plaintiff is informed and believes, the said defendants [*name stockholders whose subscriptions to stock are unpaid*] were at the time of the incurring of the indebtedness due to the plaintiff, and still are stock holders and directors in the said corporation by virtue of subscriptions made by them to its capital stock, to the following amounts respectively [*name amounts of stock subscribed for by each of said defendants*], but that the said defendants did not at the time of their subscriptions pay, nor have they since paid the full par value of their said subscriptions, but that a large amount is due thereon from each of the said defendants respectively, to-wit [*name amount due from each defendant, or if amounts due cannot be ascertained, say:* but that the amount paid by each defendant, as well as the amount remaining due from him on said subscriptions said plaintiff has not been able to ascertain, but upon information and belief alleges that each of said defendants still owes upon his said subscriptions of stock a large amount].

VIII. The plaintiff further alleges, upon information and belief, that at some time in the year 19.., the ..... company, a corporation existing under the laws of this state, became indebted to the defendant corporation in a large sum, to-wit, the sum of about ..... dollars, which it liqui-

dated in whole or in part by delivering to the defendant corporation a large amount of its first mortgage bonds and other securities of great value, the exact amount of which the plaintiff cannot state; that after the delivery of the said bonds and securities, and while the said corporation defendant was insolvent and indebted to the plaintiff as aforesaid, the said defendants [*name the corporate officers charged with conveying property to themselves*] in their capacity as directors of said corporation defendant voted to and did convey and assign to themselves jointly, or to some of them individually, the said bonds and other securities, or some considerable part thereof, without consideration, or for a pretended consideration which did not in fact exist, for the purpose of hindering and defrauding the creditors of said defendant corporation, and that the said bonds and securities so transferred as aforesaid are still in the possession of the said defendants [*name them*] and that the same, or the proceeds thereof ought in equity to be applied to the payment of the aforesaid debt of the plaintiff.

IX. [*Insert allegation negativing collusion, as in Form 1654.*]

WHEREFORE the plaintiff demands judgment that the said defendants [*name them*] and each of them, be required to disclose any and all real estate or personal property held by them or either of them in trust for said corporation, or acquired by them in fraud of the creditors thereof, and that the said defendants who are stockholders in the said defendant corporation be required to disclose the amounts paid by them respectively on their subscriptions to stock, and how much thereof is still unpaid; that the said transfers of property made by the said corporation defendant to the remaining defendants in fraud of its creditors as aforesaid be cancelled and held void, and that the said directors be required by judgment of this court to turn over to the receiver to be appointed in this action all such property so held by them or either of them, and to account for the proceeds of any of such property which they or either of them have disposed of; that the said defendants, and each and all of them, be enjoined and restrained from selling, assigning or transferring any of the property of the said corporation, and any of the property assigned or conveyed to them by the said corporation in fraud of its creditors as aforesaid; that a receiver be

appointed in this action to take charge of the property and effects of the said corporation defendant which may be recovered as aforesaid; that the plaintiff's said judgment be paid out of the proceeds of the said property so recovered; and that the plaintiff have such other and further relief as may be just and equitable.

1676. By judgment creditor to enforce resulting trust in land purchased by debtor and conveyed to a third person.

I, II, III, and IV. [*As in Form 1654.*]

V. That on the .... day of ....., 19.. the defendant C.... D.... being at that time wholly insolvent and indebted to this plaintiff and other persons purchased of one L.... M.... the real estate hereinafter described and paid from his own moneys the entire consideration therefor but caused the title thereof to be taken in the name of the defendant E.... F.... in secret trust for the benefit of the said C.... D.... and with intent thereby to defraud the plaintiff and other creditors of the said C.... D.... and to prevent and hinder the collection of their just claims.

VI. [*In Wisconsin insert allegation negativing collusion as in Form 1654.*]

VII. That the real estate so conveyed is described as follows [*insert description*].

WHEREFORE plaintiff demands judgment that defendant E.... F.... holds title to said premises in trust for the creditors of defendant C.... D....; that a receiver of said premises be appointed and defendant E.... F.... be directed to make and deliver to said receiver a deed of said premises; that said receiver be directed to sell the same and out of the proceeds thereof pay to plaintiff the amount of his said judgment, with interest and the costs of this action; and for such other relief as may be just.

1677. Outline of complaint against agent wrongfully taking title of real estate in his own name.

I. [*Allege the agency of the defendant for the plaintiff and the fact that the defendant had the plaintiff's money in his hands, and in the course of his agency was charged with the duty of purchasing real estate.*]

II. [*Allege that the agent in pursuance of his agency purchased a piece of real estate, describing it, and fraudulently caused a deed to be made out in his own name as grantee without the knowledge of the plaintiff.*]

III. [*If improvements were put upon the real estate by the plaintiff or with the plaintiff's money, allege that fact.*]

IV. [*Allege when the plaintiff first learned that the deed had been taken in the name of the agent and allege that the plaintiff has demanded of the defendant that he convey the premises to the plaintiff.*]

WHEREFORE [*demand of judgment that the defendant holds title to the premises as trustee for the plaintiff and be adjudged to convey the same to the plaintiff*].

1678. By judgment creditor to reach proceeds of real property in hands of fraudulent grantee, where such grantee has conveyed to bona fide purchaser.

I, II, III and IV [*as in Form 1654.*]

V. That subsequent to the creation of the indebtedness upon which said judgment is founded, and on or about the .... day of ....., 19.., the defendant C.... D.... [*judgment-debtor*] was the owner of the following described premises [*describe them*], and that on or about said day the defendant conveyed said premises to the defendant E.... F.... without consideration; that said conveyance was made by the defendant C.... D.... and received by the defendant E.... F.... with intent to hinder, delay and defraud the plaintiff out of the aforesaid indebtedness.

VI. That thereafter and on or about the .... day of ....., 19.., the defendant E.... F.... conveyed said premises to one G.... H.... and received in payment therefor the sum of ..... dollars [*or*, a large sum of money, the exact amount of which is unknown to plaintiff].

VII. [*In Wisconsin insert allegation negativing collusion as in Form 1654.*]

WHEREFORE plaintiff demands judgment that the deed from the defendant C.... D.... to the defendant E.... F.... be adjudged fraudulent and void as to the plaintiff; that the moneys received by the defendant E.... F.... upon the conveyance of the aforesaid premises be

adjudged to have been received by the said defendant in trust for this plaintiff as a creditor of the defendant C.... D...., and that the defendant E.... F.... account to plaintiff for any such moneys so received by him and any rents and profits thereof and of said premises; that said defendant E.... F.... be decreed to pay the same or so much thereof as may be necessary to plaintiff in satisfaction of said judgment and interest thereon, and the costs of this action, and that plaintiff may have such other and further relief as may be just.

1679. By receiver of building association against withdrawing members for contribution.

I. [*Allege incorporation of defendant as in Form 848.*]

II. [*Allege insolvency of the corporation and appointment of the plaintiff as receiver, also his qualification and entry on his duties.*]

III. [*Allege that the defendants became borrowing members of the association and give dates and amounts according to the fact and also allege their withdrawal and the cancellation of their mortgages and the assessment which was made upon them at the time of their withdrawal.*]

IV. That said association was at that time hopelessly insolvent, and that an assessment of .... percent was far from sufficient to meet the actual losses sustained, and that in thus withdrawing with a .... per cent assessment the defendants escaped their proper proportion of the losses of said company occurring while they were members and that an assessment of at least .... percent would have been required to meet all of such losses.

V. [*If there has been incompetency, misconduct or bad faith on the part of the directors, and collusion with the defendants it may be alleged here.*]

WHEREFORE the plaintiff demands judgment that the defendants herein be declared to be members and shareholders of said company for the purpose of contributing their proper proportion of the losses thereof; that an account be taken between them and the said company, and that the mutual rights and obligations be determined, and that upon a full hearing thereof they may be required to contribute their just, proper and equitable proportion of all losses sus-

tained by said company previous to the receipt by them of their money and withdrawal from said company, and for such further relief as may be just.

1680. By sheriff suing in aid of attachment (Wis. Stats. 1913 sec. 2741).

I. That at all the times hereinafter mentioned plaintiff was and now is the sheriff of the county of ....., duly elected, qualified and acting as such.

II. That on or about the .... day of ....., 19.., plaintiff received a writ of attachment, duly issued out of this court, and to him directed and delivered, in an action against one E.... F...., whereby plaintiff was directed to attach and safely keep all of the property of said E.... F.... in said county or so much thereof as might be sufficient to satisfy the demand of the plaintiff in said action, of ..... dollars, with costs and expenses.

III. That the defendant then had in his possession ..... dollars belonging to E.... F.... [*or*, was indebted to the said E.... F.... in the sum of ..... dollars for, *state briefly the cause of action*].

IV. That on or about the .... day of ....., 19.., plaintiff made due service of said writ of attachment upon the defendant, by delivering to and leaving with him a copy thereof and of the affidavit and undertaking upon which it was granted [*if the statute requires the service of any other papers allege that they were served*], whereupon the plaintiff became entitled to receive from the defendant, and he became answerable to the plaintiff for said ..... dollars, but the defendant refuses to pay the same or any part thereof over to the plaintiff, or to account to him therefor.

WHEREFORE, etc.

CHAPTER LXXIII.

COMPLAINTS IN EQUITABLE ACTIONS TO RELIEVE AGAINST FRAUD OR MISTAKE.

1681. Complaint to set aside a deed fraudulently represented to be an instrument of another character.
1682. Complaint to set aside a deed obtained by fraud, and for reconveyance.
1683. The same, another form.
1684. For rescission of contract and repayment of advances, on the ground of fraud.
1685. To reform a deed by correcting mistaken description.
1686. The same, another form.
1687. To correct mistakes in an account stated, and for judgment thereon.
1688. Outline of complaint to set aside exchange of lands on the ground of fraudulent representations.
1689. Complaint to obtain relief from the legal effect of a quitclaim deed executed by plaintiff under mistaken idea as to its effect on a mortgage held by him on the premises.

The power of a court of equity to relieve against the consequences of fraud or mutual mistake of fact, and to decree the reformation or cancellation of written instruments procured thereby is very extensive and frequently exercised. Complaint seeking relief on these grounds must clearly state the facts which constitute the fraud or the mistake, as well as the facts which exonerate the plaintiff from the charge of negligence in making the contract and laches in seeking his remedy. These facts may be so numerous and varied that forms can be hardly more than suggestive.

1681. Complaint to set aside a deed fraudulently represented to be an instrument of another character (sustained by Johnson v. Wetmore, 12 Barbour, 433).

I. That on the .... day of ....., 19.., the plaintiff was the owner of a farm situate in the town of ..... county of ..... [*briefly describing it*].

II. That the plaintiff, being then old, infirm, and blind, and by reason thereof incapacitated from attending properly to business, the defendants, on that day, fraudulently taking

advantage of the plaintiff's said incapacity, which they well knew, procured him to sign a certain writing, without paying him any consideration therefor, and which writing they falsely and fraudulently represented to be a mere matter of form [*or state what representation was made*].

III. That the plaintiff has since, and on the .... day of ....., 19.., applied to the defendants for said writing, or for information as to the contents thereof; but the defendants refused to allow him to see said writing, or to give him any information concerning the same. That, as the plaintiff is informed and believes, the said writing is under seal, and is a deed of said premises, and conveys the same, or some interest therein, to the defendants; and that they intend to use the same for their own benefit, and to the prejudice of the plaintiff.

WHEREFORE plaintiff asks judgment that the said deed or writing be declared void; and that the defendant produce the same, and deliver the same up to be cancelled; and that the plaintiff have such other and further relief as may be just and equitable, and that he recover the costs of this action.

1682. Complaint to set aside a deed obtained by fraud, and for reconveyance.

I. [*Allege ownership of land as in Form 1681.*]

II. That on said day the defendant applied to the plaintiff to purchase the said real estate, and as the plaintiff resided at the distance of .... miles from said land, and knew nothing of its value, or of the improvements being made in its vicinity tending to enhance the value thereof, he applied to the defendant, who was well acquainted with the same as to its value and location, and the improvements being made in its vicinity. The defendant thereupon informed plaintiff that the land was not worth to exceed ..... dollars, and situated .... miles from any settlement, and that he knew of no improvements being made in that vicinity calculated to enhance the value thereof [*or otherwise state the representations made*].

III. That relying upon said representations of said defendant, the plaintiff sold and conveyed said land to him for the sum of ..... dollars.

IV. That at the time said defendant made the said representations the settlement extended to said land, and the city of ..... containing three thousand inhabitants, was less than one mile therefrom, and that said premises, at the time of the execution of said deed, were well worth in cash the sum of ..... dollars, of all which said defendant was well aware at the time he made said false and fraudulent representations, but of which plaintiff had no knowledge whatever.

V. That as soon as plaintiff discovered that said representations were false, to-wit, on the .... day of ....., 19.., he applied to the defendant and tendered to him said sum of ..... dollars so paid for said premises, and requested him to reconvey the same to plaintiff, which he refused and still refuses to do; and that plaintiff, therefore, brings said sum of ..... dollars into court for the purpose of having the same delivered to the defendant, when he will accept the same, and reconvey said premises to the plaintiff.

WHEREFORE the plaintiff demands judgment that said defendant be required to reconvey said premises to the plaintiff, and that the title to the same may be quieted and confirmed in the plaintiff, and for such other relief as may be equitable, and for the costs and disbursements of this action.

1683. The same, another form.

I. That on the .... day of ....., 19.., the plaintiff was the owner in fee of the following described lands and premises [*describe same*] which were of the value of ..... dollars.

II. That the defendant, on that day, offered to purchase said premises, and in order to induce the plaintiff to convey the same to him, offered to transfer and assign to the plaintiff in exchange therefor [*here describe property exchanged, as for instance:* fifty shares of stock in a certain corporation known as the ..... company.

III. That to induce said plaintiff to make said exchange the defendant falsely and fraudulently represented to the plaintiff that [*here state the false representations of fact fully and particularly*].

IV. That in truth and in fact the representations so made by said defendant were each and all false and fraudulent, as the defendant then well knew; and that he made the

same for the purpose of defrauding the plaintiff out of his said land; that [*here negative directly and specifically each false statement*], all of which the said defendant knew when he made the representations aforesaid.

V. That relying upon said false and fraudulent representations, and believing the same to be true, the plaintiff accepted the defendant's offer, and on the .... day of ....., 19.., in consideration of the transfer of said property by defendant to him, the plaintiff made, executed and delivered to the defendant a deed of warranty of the above described premises [of which deed a copy is hereto annexed, marked Exhibit A and made a part of this complaint], and thereupon let the said defendant into possession of said premises which the defendant now holds.

VI. That the said deed was afterwards, on the .... day of ....., 19.., duly recorded in the office of the register of deeds for ..... county in book D of deeds, on page ....

VII. That the plaintiff did not discover the falsity of said representations so made to him by the defendant until the .... day of ....., 19.., on which day he tendered back to the defendant [*or* offered to return to the defendant] the said personal property so delivered to plaintiff by the defendant [with a properly executed assignment thereof] and demanded that defendant reconvey the said premises to him, this plaintiff, [and presented to the defendant a quit claim deed, duly filled out and ready to be signed and executed for that purpose] and demanded that the defendant give up to the plaintiff the possession of said premises, but that the said defendant wholly refused and still refuses to reconvey said land, or to give up the possession thereof.

VIII. That the plaintiff still has said property so transferred to him by defendant and [*if property is capable of surrender into court:* now brings the same into court for the benefit of defendant; *or if not:* is ready and willing to deliver the same to defendant, as the court shall direct].

WHEREFORE the plaintiff demands judgment that said conveyance be cancelled, and that the defendant be adjudged to reconvey the said premises to the plaintiff, and deliver possession thereof to the plaintiff, and for such other relief as may be equitable, and for the costs of this action.

1684. For rescission of contract and repayment of advances, on the ground of fraud (see Belknap v. Seely, 14 N. Y. 143).

I. That the plaintiff, on the .... day of ....., 19.., bargained with the defendant to buy of the defendant a piece of ground at ..... [*briefly designating it*] which was chiefly valuable for the purpose of dividing into city lots, and purchased by the plaintiff for that purpose, as defendant well knew.

II. That the defendant, well knowing said premises to contain a much less quantity than .... acres of land, viz. .... acres only, then and there falsely and fraudulently represented to him that the premises contained .... acres; and falsely and fraudulently induced him to buy the said premises for ..... dollars.

III. That plaintiff, relying on said representations, agreed in writing to buy the premises, and paid defendant ..... dollars, part of the purchase money thereof.

IV. That the premises did not contain .... acres, but only .... acres; whereby the plaintiff was deprived of all the benefit and advantage which he otherwise would have derived from the said sale.

V. That on or about the .... day of ....., 19.., as soon as he had ascertained that the said representations were untrue, he tendered to defendant a duly executed quit claim deed of said lands, and demanded of defendant the rescission of said agreement and a return of said ..... dollars, but defendant refused and still refuses to consent thereto.

WHEREFORE the plaintiff demands judgment for ..... dollars, with interest from the .... day of ....., 19..; that the said agreement of purchase be delivered up and cancelled; and that the plaintiff have such other and further relief as may be equitable, with the costs of this action.

1685. To reform a deed by correcting mistaken description.

I. That on the .... day of ....., 19.., the defendant executed and delivered to the plaintiff, under his hand and seal, a deed, of which the following is a copy [*give exact copy of deed with erroneous description*].

II. That the description therein given of the premises intended to be conveyed thereby was erroneous, and in fact does not describe any premises whatever; that the word "southerly," as last used in said description, was inserted by mistake of the parties to said deed [*or otherwise; and if fraud is relied on, the circumstances of it should be specially stated*], instead of the word "northerly" which should have been used instead thereof; and that in order to make said deed pass any premises whatever to this plaintiff, and to make it conform to the actual intentions of the parties, it is necessary that the said description should be amended by substituting the word "northerly" for the word "southerly", where the latter word is last used therein [*or say:* amended so as to read as follows, *and insert description in full as amended*].

III. That the plaintiff has paid to the defendant for the said premises the consideration expressed in said deed.

WHEREFORE this plaintiff demands judgment that said deed be reformed as aforesaid, and for such further relief as may be just, with costs.

1686. The same, another form.

I. That on or about the .... day of ....., 19.., the plaintiff and defendant negotiated a bargain and sale by defendant to plaintiff of the following described premises, to-wit, [*describe premises*] for the sum of ..... dollars to be paid by plaintiff.

II. That in pursuance of said agreement, the said defendant on said day executed and delivered to the plaintiff a deed of warranty, intending thereby to convey the premises above described, and the plaintiff thereupon paid said sum of ..... dollars, the consideration for said premises, believing that he was receiving a deed of the premises above described, and immediately caused the same to be recorded in the office of the register of deeds for ..... county, on the .... day of ....., 19.., in volume .... of deeds, on page ....

III. That by mistake of the parties in the drafting of said deed, the premises were erroneously described therein as [*state description in deed*] instead of the premises to be conveyed as aforesaid, and that the defendant did not in fact own the

premises actually described in said deed or have any interest therein.

IV. That it is necessary that the said deed be reformed so that the description therein shall read as follows [*here give true description of land intended to be conveyed*].

V. That the plaintiff, on the .... day of ....., 19.., requested the defendant to execute a deed in correction of said mistake [and tendered him for execution a warranty deed containing the proper description, and requested him to execute the same] but he refuses so to do.

WHEREFORE the plaintiff demands judgment that said deed, executed and recorded as aforesaid, be reformed so as to correctly describe the premises intended to be conveyed, and for such other relief as may be agreeable to equity, and for the costs of this action.

1687. To correct mistakes in an account stated, and for judgment thereon.

I. That the plaintiff and defendant, having had mutual dealings, afterwards, on the .... day of ....., 19.., came to a mutual accounting, upon which a statement of the said account was made in writing, of which a copy is annexed as a part of this complaint, whereby a balance of ..... dollars was found to be due from the plaintiff to the defendant [*or*, from the defendant to the plaintiff] on final adjustment.

II. That since the said statement of account the plaintiff has discovered errors and false charges [*or*, credits, *or both*] therein, of which he was wholly ignorant at the time of such settlement.

III. That in the statement of said account so settled he is charged [*here state the items wrongfully charged, and show what is the error.*]

IV. That the following items, which ought to have been entered to his credit in said account, were wholly omitted therefrom, by mistake and oversight, to-wit [*here set forth the items, with date, amount, etc.*]

V. That the following items are erroneous in amount, in this: that the credit for ..... should have been of ..... dollars, instead of only ..... dollars [*stating briefly the grounds why it should have been more*].

VI. That the said account ought to be corrected as above mentioned; and the balance thereon ought to be ..... dollars in favor of the [plaintiff] instead of being ..... dollars in favor of the [defendant].

VII. That as soon as the plaintiff discovered the said mistakes and errors, he called on the defendant, on the .... day of ....., 19.., and pointed the same out to him, and then requested the defendant to correct the same, and to restate the said account, with the mistakes and errors aforesaid corrected; but the defendant refused to do so, or to pay the plaintiff any part of said sum of ..... dollars, due to him at the time said account was stated [*or*, and to accept the sum of ..... dollars from the plaintiff in full payment of said account].

WHEREFORE the plaintiff demands judgment that he may be allowed to prove the said errors and mistakes in the stating of said account, and that the same be restated; that judgment may be rendered against the defendant for the balance of ..... dollars due him on said corrected account, with interest thereon from the .... day of ....., 19.., with the costs of this action.

1688. Outline of complaint to set aside exchange of lands on the ground of fraudulent representations.

I. [*Allege that parties negotiated for an exchange of lands describing the land owned by plaintiff and that owned by defendant.*]

II. [*Allege the representations made by the defendant in order to induce the exchange, if the lands exchanged were in a distant state allege the fact and the artifices, if any, used by defendant to prevent investigation or discovery of the falsity of the representations.*]

III. [*Allege the facts showing that the plaintiff was justified in relying upon and did rely upon the representations in making the exchange.*]

IV. [*Allege the making of the deeds, if deeds were made.*]

V. [*Negative specifically the false representations.*]

VI. [*Allege plaintiffs offer to reconvey and demand that the defendant reconvey and show that plaintiff has offered and is ready to restore all that he has received and place defendant in the same position as before the exchange.*]

WHEREFORE, etc. [*Demand judgment for rescission, cancellation of deeds, reconveyances, etc.*]

1689. Complaint to obtain relief from the legal effect of a quitclaim deed executed by plaintiff under mistaken idea as to its effect on a mortgage held by him on the premises.

[*See complaint sustained and reported in substance in Benson vs. Markoe, 37 Minn. 30; 33 N. W. 38.*]

CHAPTER LXXIV.

COMPLAINTS IN ACTIONS TO DISSOLVE PARTNERSHIP.

1690. To dissolve partnership for various causes.
1691. The same, alleging misappropriation of funds by the defendant.
1692. By administrator of deceased partner, against the survivor.
1693. To dissolve an insolvent partnership when partners cannot agree.
1694. Outline of complaint for accounting on a joint adventure where defendant has received the proceeds.

1690. To dissolve partnership for various causes.

I. That on the .... day of ....., 19.., the plaintiff and the defendants [*copartners*] formed a partnership for the purpose of [*state business*] under articles of copartnership, of which a copy is annexed and made part of this complaint and marked Exhibit A. [*Or, if the agreement was not in writing, state its effect briefly, e. g.,:* under an agreement that the plaintiff should contribute the use of ..... dollars capital, and that the plaintiff and the defendants [*copartners*] should co-operate in the care and labors of the business, and that the plaintiff should receive one-half of the net profits, and upon a dissolution of the partnership, repayment of his capital, and that the defendants should receive each one-quarter of the net profits.]

II. That the plaintiff and defendants now own a valuable lease of premises No. ...., ... street in ....., and a large and valuable stock of goods; that they have also a large amount of debts due them, and a valuable good-will, which are of far greater value when taken together than if separated; and that no equitable divisions of the assets and good-will of said partnership can be made without great loss to all parties, except by a sale thereof together, and a division of the proceeds thereof.

III. [*Where the dissolution was by an assignment, say:* That on the .... day of ....., 19.., the defendant [*a partner*] without the knowledge or assent of the plaintiff, by

writing assigned and transferred to the defendant [*assignee*] all his interest in said partnership, and all his right and title to any and all property belonging to said firm; whereby said partnership became dissolved.]

[*Or, where the dissolution is by exclusion of the plaintiff:* That on the .... day of ....., 19.., the defendant, *a partner*, took exclusive possession of the partnership books and stock, and then and ever since has prevented the plaintiff from having access to the same.]

[*Or, where the dissolution is upon notice given by one of the partners:* That on the .... day of ....., 19.., the defendant, *or plaintiff*, pursuant to the provision of said agreement, gave to the *defendant or* plaintiff a written notice of his intention to dissolve said agreement, of which a copy is annexed as a part of this complaint, and marked Exhibit B.]

[*Or, where the dissolution is on the ground of the insolvency or arrest of a partner:* That the defendant before this action and on or about the .... day of ....., 19.., became insolvent, was arrested on the .... day of ....., 19.., at the suit of one M.... N.... for a debt of ..... dollars (and in consequence of such arrest, has ever since been a prisoner at .....); and that by reason of such insolvency (and arrest) the partnership has been greatly discredited, and has sustained loss by the absence of said defendant therefrom.]

WHEREFORE the plaintiff demands judgment that the said partnership be adjudged dissolved; that a receiver of the property, rights and good-will of said partnership be appointed, with power to dispose of the same, and to collect all debts for the benefit of all parties entitled thereto, and that the proceeds thereof be divided, after payment of all just debts of said partnership and the costs of this action, between the parties hereto, according to their respective rights; and for such further relief as may be just.

1691. The same, alleging misappropriation of funds by the defendant.

I. [*As in preceding form.*]

II. That said plaintiff and defendant entered upon, and have ever since continued to carry on the said copartnership business, under and in pursuance of said agreement, no other articles or instrument having ever been executed between them.

III. That since the commencement of said partnership, the defendant has, from time to time, applied to his own use, from the receipts and profits of said business, large sums of money, greatly exceeding the proportion thereof to which he was entitled, and in order to conceal the same said defendant, who has always had the management of the copartnership books, has never balanced said books.

IV. That on or about the .... day of ....., 19.., the plaintiff discovered that the defendant was greatly indebted to said copartnership, by reason of his applying the copartnership moneys to his own use, as aforesaid; that the plaintiff then requested the defendant to pay all copartnership moneys that he received into the ..... bank, in which the copartnership was accustomed to keep its accounts, and to draw therefrom only such sums as such copartnership had occasion for; that said defendant wholly disregarded said request, and continued to apply the copartnership moneys received by him to his own use, without depositing the same in said bank, or any other bank, to the credit of the firm, and has also taken to his own use moneys received by the clerks of said firm, and has by such means greatly increased his debts to the copartnership, without affording to the plaintiff any adequate means of ascertaining the true state of his accounts.

V. That the defendant has received the sum of ..... dollars over and above his due proportion of the copartnership profits, and that he continues to collect the copartnership debts and appropriate the moneys to his own use.

WHEREFORE the plaintiff demands judgment: (1) That the said copartnership may be dissolved, and an account taken of all the said copartnership dealings and transactions from the commencement thereof, and of the moneys received and paid by the plaintiff and defendant respectively in relation thereto. (2) That the property of the firm, real and personal, be sold, and the copartnership debts and liabilities be paid off, and the surplus, if any, divided between the plaintiff and defendant, according to their respective interests. (3) That in the meantime the defendant may be enjoined from collecting or receiving or in any manner interfering or intermeddling with, or disposing of the partnership debts or moneys, or other property or effects of said partnership. (4) That a receiver of the partnership mon-

eys, property, and effects may be appointed, with the usual powers and duties. (5) And for such other and further relief as may be just, with the costs of this action.

1692. By administrator of deceased partner, against the survivor.

I. [*As in Form 1690, substituting decedent's name for the words "the plaintiff."*]

II. That the said copartnership business was entered upon pursuant to said agreement, and continued to be carried on under and pursuant to the same up to the time of the death of the said [*decedent*] which occurred on the .... day of ....., 19.., said [*decedent*] having advanced large sums of money towards the capital stock.

III. That at the time of the death of the said [*decedent*] there was on hand partnership assets to the amount or value of about ..... dollars, as follows: a large amount of personal property, consisting of [*name it*] of the estimated value of ..... dollars; real estate situated [*describe it*] of the estimated value of ..... dollars; together with book-accounts, notes, and other demands of the estimated value of ..... dollars; and the debts and liabilities of said firm amounted to about ..... dollars.

IV. [*Allege appointment of executor or administrator as in Form 851 or 853.*]

V. That ever since the death of said [*decedent*] the said defendant has continued, individually, in the possession of the store and all said real and personal property, and to manage and carry on said business, and dispose of said stock, and to collect the debts and things in action, and to pay debts and liabilities of said firm out of the avails thereof; and he has so collected large sums, the amount of which the plaintiff does not know and cannot ascertain.

VI. That said defendant has not paid over to said plaintiff, as administrator of the estate of said [*decedent*] any moneys or other proceeds of said copartnership since the death of said [*decedent*] [except ..... dollars]; nor has he assigned, transferred, or delivered over to said plaintiff any of the assets, securities, or other property of said copartnership [except, etc., *describing what has been delivered, if any*].

VII. That within a few weeks last past, said defendant has become embarrassed in business, and has stopped payment, and is unable to give any security for the payment to the plaintiff, as the representative of said [*decedent*] of the value of the interest of said [*decedent*] in said copartnership.

VIII. That the plaintiff has requested of said defendant a statement and account of said copartnership transactions, which the defendant refused to give; and that he has offered defendant to settle and wind up the affairs of said late copartnership in the manner specified in said agreement, which he has neglected to do.

WHEREFORE the plaintiff demands judgment: (1) That an account may be taken of all the said copartnership dealings and transactions, from the time of the commencement thereof to the time of dissolution by the death of said [*decedent*] and an account of the moneys received and paid by the said partners respectively in regard thereto; that the defendant may account with the plaintiff for all his dealings with, and transactions in regard to the property, assets, and effects of said firm since its dissolution by the death of said [*decedent*] and the property sold or disposed of by him, either as surviving partner or otherwise, and of the moneys collected and received and paid out by him on account thereof. (2) That the defendant may be adjudged to pay the plaintiff, as administrator aforesaid, what, if anything shall upon the taking of the said accounts appear to be due the said plaintiff as such administrator of said [*decedent*] the said plaintiff, as administrator aforesaid, being ready and willing, and hereby offering to pay the defendant what, if anything, shall appear to be due him on such accounting. (3) That a receiver be appointed, with the usual powers and duties, and under the usual directions; and that the defendant may be restrained by order of this court from disposing of, or in any manner interfering with, the property and effects of said firm, or from collecting or receiving the copartnership debts or other moneys coming to said firm. (4) For such other or further relief as may be just, with costs of this action.

1693. To dissolve an insolvent partnership when partners cannot agree.

I and II. [*As in Form 1690.*]

III. That said firm is indebted to an amount exceeding ..... dollars, and is insolvent and unable to meet its obligations, and that both the plaintiff and defendant are also insolvent.

IV. That a considerable part of said firm property to-wit [*name property*] is covered by chattel mortgages heretofore duly executed by the parties to creditors of said firm and duly filed in the proper office, which are now due and payable, and which said creditors threaten at once to foreclose by taking possession of and selling the said property.

V. That sundry unsecured creditors of said firm are also threatening and about to commence actions against said firm, and attach its property, and that the parties are unable to agree upon the method of conducting the business of said firm or of winding up the affairs thereof.

VI. That unless the said firm be dissolved and its property and affairs administered by a receiver appointed by the court, its property will be sacrificed at forced sales and great injury will thereby result not only to the parties, but also to the creditors of said firm.

WHEREFORE, etc. [*prayer for judgment as in previous forms in this chapter.*]

1694. Outline of complaint for accounting on a joint adventure when defendant has received the proceeds.

I. [*Allege the agreement between the parties, the contribution of funds or labor thereto by each party.*]

II. [*Allege the prosecution of the adventure the profits, if any, the property resulting therefrom or the money as the case may be; if property, show that it came to the possession of the defendant and is still in his possession or has been disposed of by him and the proceeds are still in his hands.*]

III. [*Allege demand for an accounting and refusal.*]

WHEREFORE, etc. [*Demand judgment for an accounting, and that the defendant be adjudged to pay over to plaintiff the sums found due on such accounting; that such sums be adjudged a lien upon the real estate, if the proceeds of the adventure have gone into real estate.*]

CHAPTER LXXV

COMPLAINTS IN ACTIONS TO SEQUESTRATE PROPERTY OF A DOMESTIC BUSINESS CORPORATION, WIND UP ITS AFFAIRS AND ENFORCE LIABILITIES OF OFFICERS AND STOCKHOLDERS

1695. Complaint by judgment creditor to sequestrate property of insolvent corporation.

1696. Complaint by creditor of insolvent corporation against the corporation and its stockholders, to sequestrate assets and enforce payment of stock subscription.

1697. Complaint by corporation creditor against the corporation and its officers, to sequestrate and enforce stock subscriptions, and set aside a fraudulent assignment for the benefit of creditors.

1698. Complaint by stockholder or creditor, to close up the business and sequestrate the property of an insolvent state bank.

1699. Supplemental complaint filed by leave of court by an intervening creditor in an action brought by a stockholder to sequestrate the bank property; in which supplemental complaint directors and officers are brought in, and claims to recover corporate property lost or squandered by them litigated.

1700. Amended complaint in creditor's action against insolvent bank and its officers, to sequestrate property and enforce statutory and common law liabilities of the stockholders and officers.

1701. Complaint by creditor of insolvent business corporation to enforce liability of stockholders for wages due employees under Wisconsin Statutes.

1702. Complaint by creditor against insolvent bank and stockholders to enforce additional liability of stockholders under the banking law.

In Wisconsin the law with regard to sequestration actions against domestic corporations and the enforcement of statutory and common-law liabilities of officers, stockholders and third persons fraudulently colluding with officers or stockholders is quite well settled by the provisions of Wis. Stats.

1913 secs. 3216 to 3228, and the various decisions made thereunder.

Independently of the statute, a common law creditor's action to reach non-leviable assets of a domestic business corporation may doubtless still be commenced [*see Chapter LXXII of this work*], but it will be superseded by an action subsequently commenced under the statute, by virtue of the provisions of sec. 3227, *supra*, Pierce v. Mil. C. Co., 38 Wis. 253.

Under the statutes there may be said to be three general forms of action: (1) Under secs. 3216 and 3217 a judgment creditor with execution returned unsatisfied, may maintain a sequestration action against any domestic business corporation, and may join delinquent stockholders and officers, obtain a receiver and collect and distribute the assets to all creditors; such an action is within the general powers of a court of equity, in the absence of a statute, but the statute recognizes and supplements the preexisting right. Adler v. M. P. B. M. Co., et al., 13 Wis. 57. (2) Under secs. 3218 *et seq.* a sequestration action may be commenced against any insolvent banking or insurance corporation by the attorney-general on behalf of the state, or by any creditor or stockholder of the corporation, and the creditors need not have obtained a previous judgment. Hurlbut v. Marshall, 62 Wis. 590, 22 N. W. 852. This action is brought for the benefit of all creditors, and is to reach all assets of the corporation, all liabilities of stockholders, officers, and other persons who have corporate property in their possession, and apply the same to the payment of debts. The corporation should be made a party in either of the cases above referred to, unless its assets have been wholly exhausted or it has been dissolved, in which case the fact should be stated in the complaint. Both this and the first form of action may be commenced in simple form and even against the corporation alone, without joining all of the parties against whom relief may be ultimately sought or obtained, the idea being that by the appointment of a receiver and the obtaining of an injunctional order the corporate assets shall be at once impounded and conserved; but they are both potentially actions for the enforcement of all the creditor's rights against the corporation, its stockholders, officers, and third persons in possession of the corporate property, and for the mar-

shalling of the assets and the payment of the debts, and are exclusive of all other actions for these purposes. In order to effect this result the court will freely allow supplemental pleadings to be served, new parties to be brought in, and will even substitute new plaintiffs, as the case may require. Gager v. Marsden, 101 Wis. 598; 77 N. W. 922; Boyd v. Mut. F. Co., 116 Wis. 155; 90 N. W. 1086; 94 N. W. 171; Harrigan v. Gilchrist, 121 Wis. 127-274; 99 N. W. 909. A personal cause of action by one creditor against a corporate officer for deceit cannot be joined. Killen v. Barnes, 106 Wis. 546; 82 N. W. 536. It was held in Clarke v. Banner, etc. Co., 50 Wis. 416; 7 N. W. 309, that in an action brought under sec. 3216 third persons to whom corporate property had been fraudulently transferred could not be made parties. This ruling was, however, indirectly over-ruled by subsequent cases, and directly by the case of Harrigan v. Gilchrist, *supra*, pp. 272 *et seq.* (3) In addition to these sequestration or winding up actions the statutes of Wisconsin provide for an action in equity by a creditor against officers or stockholders of an insolvent corporation, to enforce liabilities created by law, in which the corporation may or may not be joined, at the election of the plaintiff. Wis. Stats. 1913 secs. 3223-3224. This action is not a sequestration action. It may be brought by a creditor without previous judgment, for the benefit of all creditors, or all of the class in favor of which the liability exists. Sleeper v. Goodwin, 67 Wis. 577; 31 N. W. 335. It is not necessary in this case that the assets of the corporation be exhausted, but it must appear that the liability of the stockholders will necessarily have to be resorted to to pay the corporate debts, and all the stockholders should be made parties. Booth v. Dear, 96 Wis. 516; 71 N. W. 816; Williams v. Melvy, 97 Wis. 561; 73 N. W. 40. If the corporation is not made a party defendant, sufficient reason for the omission should be shown. Booth v. Dear, *supra*. If there be parties or property that cannot be reached in the first action brought an additional action may afterward be maintained.

In Minnesota the statutes regulating sequestration actions against corporations are quite similar to the Wisconsin provisions, and have received a substantially similar construction. Minn. Gen. Stats. 1913 sec. 6631 *et seq.* Arthur v. Willins, 44 Minn. 412; 46 N. W. 851.

In North Dakota the statutory provisions for sequestration actions are quite similar to the provisions in Wisconsin. N. Dak. Rev. Codes 1905, secs. 7369-7382.

In South Dakota, in the absence of direct statutory provision, it has been held that a creditor's action at common law may be brought against the corporation, its officers, stockholders, and third persons, to reach concealed assets or misappropriated property, but in case a receiver has been appointed in supplementary proceedings the action must be brought by the receiver. South Bend T. & M. Co. v. P. F. & M. Ins. Co., 4 S. Dak. 179; 56 N. W. 98. The statute makes stockholders individually liable for the corporate debts to the amount unpaid on their stock to be recovered in a joint or several action by a creditor. S. Dak. C. C. 1908, sec. 441.

Doubtless the common law remedy to sequestrate the property of an insolvent corporation and reach concealed or fraudulently conveyed assets in the hands of officers, stockholders or their confederates in an action in equity brought by a judgment creditor who has exhausted legal remedies, for the benefit of all creditors, still exists in all jurisdictions where it has not been abolished by statute. Maxwell on Code Pleading, p. 168.

1695. Complaint by judgment creditor to sequestrate property of insolvent corporation.[1]

I, II, III and IV. [*As in Form 1654, remembering that the execution must be issued to and returned by the sheriff of the county in which the defendant corporation has its principal office and this fact should be alleged.*]

V. [*Allege corporate existence of the defendant corporation as in Form 848 and its business.*]

VI. That said judgment is still wholly unsatisfied and that the defendant is insolvent.

WHEREFORE the defendant demands judgment that the stock, property, things in action and effects of the defendant, of every nature, be sequestrated and placed in the hands of a receiver to be appointed by this court as provided by law; that the proceeds of said property be distributed

[1] Wis. Stats. 1913 sec. 3216, 3217; Minn. Gen. Stats. 1913 sec. 6634.

among the creditors of said corporation as provided by law and the order of the court, and for such further relief as may be just with costs.

1696. Complaint by creditor of insolvent corporation against the corporation and its stockholders, to sequestrate assets and enforce payment of stock subscription (adapted from complaint sustained in Alder v. Milwaukee P. D. Co., 13 Wis. 57).

I, II, III and IV. [*As in last preceding form.*]

V. [*Allege corporate character and business of the defendant corporation.*]

VI. Upon information and belief, the plaintiff alleges that the above named defendants [*name defendants who are stockholders and have not paid their subscriptions*] on or about the .... day of ....., 19.., became subscribers to the capital stock of the said defendant corporation, and stockholders therein to the following amounts, respectively [*name stockholders and the amount of their respective subscriptions*], and the plaintiff further alleges, on information and belief, that the said last named defendants have only paid a very small amount, not exceeding ten per cent, of the capital stock by them subscribed, respectively, as above set forth, and that the remaining amounts of capital stock subscribed by them still remains due and unpaid.

VII. That the said defendant corporation, on or about the .... day of ....., 19.., entered into the business of manufacturing and selling [*name the business of the corporation*] during the years 19.. and 19.. and up to the month of June, 19.., at which time the said defendant corporation became, and ever since has been, insolvent, and has ceased to do business.

VIII. Plaintiff further alleges, upon information and belief, that the defendants E.... F.... and G.... H.... are insolvent, and that there may be other defendants who are irresponsible and insolvent; and the plaintiff alleges that there are, as he is informed and believes, other creditors of said defendant corporation whose claims and demands are unpaid, and for whose benefit this action is prosecuted as well as for the benefit of the plaintiff.

WHEREFORE plaintiff demands judgment that an account may be taken of the amounts due from said defendant corporation to all persons who may elect to come in and prove their claims as creditors of the said corporation; that an account may also be taken of the amounts, respectively, paid by the said defendants, as stockholders of said company, of the amount of their respective subscriptions to stock, and the amounts yet unpaid by each of said defendants upon said subscriptions; that it may be ascertained who, if any, of said defendants are insolvent and irresponsible, and that said defendant stockholders be decreed to pay the balance so found unpaid on their respective stock subscriptions, or so much thereof as may be sufficient to pay the debts of the said company, ascertained as aforesaid, besides the costs of this action, taking into account the irresponsibility and insolvency of any of said defendants; that a receiver may be appointed to receive the said several sums of money so decreed to be paid by said several defendants, and to distribute the same among the said creditors of said company, according to the order and direction of this court, and that the plaintiff have such other and further relief in the premises as may be just and equitable.

1697. Complaint by corporation creditor against the corporation and its officers, to sequestrate assets, enforce stock subscription, and set aside a fraudulent assignment for the benefit of creditors (adapted from complaint sustained in Powers v. Hamilton Paper Company, 60 Wis. 23; 18 N. W. 20).

I, II, III and IV. [*As in last preceding form.*]

V. [*Add allegation of corporate character of the corporation defendant.*]

VI. That said defendant corporation is largely indebted to various persons and corporations, and is wholly insolvent, and this plaintiff brings this action on behalf of all such creditors as shall come in under the same and exhibit their claims and become parties to this action.

VII. That, as the plaintiff is informed and believes, the said defendants E.... F.... and G.... H.... and J.... K.... were and still are stockholders and directors in the

said corporation defendant, and that they and each of them became such by subscribing to its capital stock, but did not at the time of said subscription, nor have they since, paid up the full par or nominal value thereof, but that a large amount is due from each of them, respectively, upon their respective stock subscriptions to the said corporation defendant, and said plaintiff alleges that whatever sums are due from said defendants respectively upon said subscriptions is in law an asset of the said corporation defendant, and ought in equity to be marshalled and applied in satisfaction of the corporate debts aforesaid of the said defendant, but that the amount which each of said defendants subscribed, and the amount paid on said subscriptions, as well as the amount remaining due thereon, said plaintiff cannot ascertain and is unable to state, but alleges that the same is a large amount.

VIII. The plaintiff further alleges, upon information and belief, that the said defendants E.... F...., G.... H.... and J.... K.... were and are the only stockholders and directors of said corporation, and that the said defendants, on or about the .... day of ....., 19.., called and held a meeting of the stockholders of said corporation, at which by resolution introduced and passed they determined that the said corporation was insolvent, and further determined that an assignment for the benefit of the creditors of said corporation of all its property and effects be made, with preferences, and that pursuant to said resolution, and on the .... day of ....., 19.., the said E.... F...., as president and secretary of said corporation, executed and delivered a certain assignment for the benefit of creditors, to one L.... M.... whereby the said corporation defendant purported to grant, bargain, sell and transfer to the said L.... M.... all and singular its goods and property of every description, in trust for the benefit of the creditors of said corporation, which said assignment was in form executed in pursuance of the laws of the state of ..... governing voluntary assignments for the benefit of creditors, and the said L.... M.... accepted the said assignment and entered upon the duties of his trust, and gave bond in due form, as required by the laws of said state.

IX. That the said assignment so made by said corporation was in fact made with the intention to hinder, delay and

defraud this plaintiff and the other creditors of said corporation defendant, and for the purpose of securing to the directors of said corporation illegal and inequitable preferences. That, as this plaintiff is informed and believes, among the debts listed in the schedule of debts attached to the said assignment, the debt of one Y.... Z.... for ..... dollars was not in fact a debt of the said corporation, but a debt owing by the said E.... F.... and G.... H.... individually, and that by the said assignment so made the said defendants E.... F.... and G.... H.... procured for themselves, to the detriment of this plaintiff and of the other creditors of the said corporation defendant payment of their said individual debt, or a part thereof, out of the assets of the said corporation, and that by reason of the said unlawful preference and payment so provided for the said assignment became and is fraudulent and void as to this plaintiff.

WHEREFORE the plaintiff demands judgment that the defendant corporation be declared insolvent; that its stock, property and things in action be sequestrated by the court, and that a receiver of the same be appointed, with the usual powers of receivers in such cases; that the amounts of the subscriptions to the capital stock of the said corporation defendant still unpaid by the said E.... F...., G.... H.... and J.... K.... be ascertained and determined, and that the said last named defendants be adjudged to pay to the said receiver the amounts so found due and owing from them, respectively, for such unpaid subscriptions; that the said L.... M.... be directed to convey to the said receiver all property by him held as assignee under the said assignment hereinbefore set forth, and that the court make a just and fair distribution of the property of the said corporation defendant among its creditors, as by law provided; and that the plintiff have such other and further relief as may be just and equitable.

1698. Complaint by stockholder or creditor, to close up the business and sequestrate the property of an insolvent state bank (adapted from first complaint in Gager v. Marsden, 101 Wis. 593; 77 N. W. 922).

I. That the above named defendant is a corporation duly

organized under and pursuant to the laws of the state of Wisconsin, in the month of April, 19.., for the purpose of carrying on a banking business, in the city of ..... in the county of ..... and state of .....; that the authorized capital of said bank was the sum of ..... dollars; that all of the capital stock of said bank was duly subscribed; that immediately after the organization of said defendant, as such bank, it commenced business in the city of ..... in the county of ..... and state of ..... and from that time to the .... day of ....., 19.., carried on the business of banking in said city.

II. This plaintiff further shows that he is a stockholder in said bank and a creditor thereof; that he is the owner of .... shares of the capital stock of said bank, of the nominal value of ..... dollars per share, and that the said bank is indebted to him in the sum of ..... dollars.

III. This plaintiff further shows that in carrying on its said business the said defendant has become and now is wholly insolvent and unable to pay its debts, and this plaintiff states, upon information and belief, that the liabilities of said bank are about ..... dollars, and that its assets and property amount to the sum of about ..... dollars; that the said defendant is wholly unable to pay its said indebtedness and is wholly insolvent; that this action is commenced by this plaintiff for the purpose of closing up the business of said bank and causing a just and fair distribution of the property of the said bank to be made among its creditors, and that the receiver heretofore appointed in this action has entered upon the discharge of his duties and has taken possession of the assets and property of said bank.

WHEREFORE this plaintiff prays the judgment of this court, adjudging and declaring the corporate rights, privileges and franchises of the said defendant forfeited; that the business of said defendant be closed up, under the direction of this court; that the receiver heretofore appointed by this court be authorized and directed to collect the assets of said bank and convert the same into money, and hold the same subject to the order of this court; that the said defendant and

all persons having any property or assets of the said defendant in their possession deliver the same to the said receiver; that the said defendant make, execute and deliver to the said receiver good and sufficient deeds of conveyance, of all real estate owned by the said defendant, and good and sufficient assignments and conveyances of any and all right, title and interest in or to any real estate belonging to the said defendant; that said receiver be also authorized and directed to collect all claims and demands of every kind, due or owing to the said bank from any and all persons and corporations, and hold and retain the same, subject to the order of this court; that a fair and just distribution of the property of the said defendant, or of the proceeds thereof, be made among the creditors of the said defendant, in the manner provided by law; that each and every of the creditors of the said defendant be required to exhibit to this court, and file in the office of the clerk of this court, each and every of their claims and demands against the said defendant, duly verified, and become parties to this action, in the manner required by law; that in default thereof, they and each of them so in default, be wholly precluded from all benefits of the judgment which shall be made and entered in this action, and from the distribution which shall be made under such judgment; that the creditors of the said defendant, and each and every of them, be restrained and enjoined, by the order of this court, from exercising any of the corporate rights, privileges or franchises of the said defendant, and from collecting or receiving any debts or demands, or from paying out, or in any way transferring or delivering to any person, any of the moneys, property or effects of the said defendant; that the creditors of the said defendant, and each of them, be restrained and enjoined, by the order of this court, from commencing any action or proceedings against the said defendant to collect their said claims against the said defendant without the order of this court, and that the said plaintiff have such other or further relief in the premises as shall be just and equitable.

1699. Supplemental complaint filed by leave of court by an intervening creditor in an action brought by a stockholder to sequestrate the bank property; in which supplemental complaint directors and officers are brought in, and claims to recover corporate property lost or squandered by them litigated (adapted from second complaint in Gager v. Marsden, 101 Wis. 598; 77 N. W. 922).

And now come the above named plaintiffs, on their own behalf, and on behalf of all other persons who have since the commencement of this action been made parties plaintiff thereto, and on behalf of all other creditors of said bank who may choose to be made parties hereto, and upon leave duly granted, make and file this amended complaint, and hereby allege and show:

I. That the said defendant, the Bank of ..... was on or about the .... day of ....., 19.., duly incorporated under the laws of the state of ..... as a banking corporation, and existed and did business as such bank at ..... in the county of ..... and state of ..... from the time of its organization until it closed its doors and ceased to do business, as hereinafter alleged.

II. Plaintiffs further allege that said defendant, Bank of ..... is, and was at the time of the commencement of this action, indebted to said plaintiff A.... B.... in the sum of ..... dollars; to the said plaintiff C.... D.... in the sum of ..... dollars, and to the said plaintiff E.... F.... in the sum of ..... dollars; and to the said plaintiffs G.... H.... and J.... K...., as copartners under the firm name of H.... & K.... in the sum of ..... dollars; and that the indebtedness due to each of said several persons and copartnership above named is for a balance of various sums deposited, in the usual course of business, by said several persons and copartnership, respectively, in said defendant, Bank of .....; and that the indebtedness to each of said several persons and copartnership was due and owing to him, or them, respectively, at the time of the commencement of this action, and has ever since been, and now is, so due and owing, and that prior to the .... day of ....., 19.., no demand had ever been made for any of said balances.

III. That said defendant, the Bank of ..... is also indebted to a large number of persons other than these plaintiffs, who have already been made parties hereto, but whose names as parties to this action have been omitted herefrom, for the reason that they are very numerous, and that it is impracticable to name them as party plaintiffs herein; and that said defendant, the Bank of ..... is also indebted to a large number of persons other than those who have been made parties hereto, and that this amended complaint is made on behalf of all other creditors of said defendant, the Bank of ..... who may choose to come in and be made parties hereto, or become interested herein.

IV. Plaintiffs further allege, upon information and belief that upon the .... day of ....., 19.., said defendant, the Bank of ..... was insolvent, and had been insolvent prior thereto, and has ever since been insolvent, as hereinafter alleged. That on said .... day of ....., 19.., said defendant, the Bank of ..... closed its doors, and ceased doing business, and that after said bank so ceased doing business, and on the same day, this action was commenced in the name of L.... M...., a creditor as well as a stockholder of said bank, as plaintiff, against said defendant, the Bank of ....., under the provisions of sections 3218 and 3219 of the statutes of said state, for the purpose of closing up the business of such bank, and that upon the same day O.... P...., Esq., of the city of ..... was by an order of said ..... court of ..... county, duly appointed receiver of said defendant Bank of ....., and that upon the same day said O.... P.... duly filed his bond as such receiver, which bond was duly approved by said ..... court, and entered upon the discharge of his duties as such receiver, and has ever since acted, and is now acting, in that capacity. That upon the same day, to-wit, the said .... day of ....., 19.., an order was made by said ..... court in said action, enjoining and restraining said defendant, the Bank of ....., its officers and agents, and each and every of them, from paying any indebtedness due from said defendant, the Bank of ..... to any person, or creditor, or from transferring or delivering to any person, or creditor, of said bank, any of the moneys, property, or effects of said bank, in liquidation or payment of any claims due from said bank to any such

person, or creditor, or otherwise, and that said order has since remained and now is in full force and effect.

V. That after the making of said last named order, and on the .... day of ....., 19.., an order was duly made by said ..... court in said action directing the publication of a notice requiring all creditors of said defendant, the Bank of ..... to exhibit their claims and become parties to said action, and that the notice directed in said order was duly published, and that in pursuance thereof these plaintiffs, and other persons similarly situated, duly exhibited their claims, and became parties plaintiff to said action, and that thereafter, and on the .... day of ....., 19.., an order was duly made by said court declaring these plaintiffs, and such other persons, parties plaintiff to said action, and making said L.... M...., because of his adverse interest in said action as a stockholder and director of said defendant Bank of ....., a defendant, instead of plaintiff, herein, and authorizing and permitting these plaintiffs, and all other creditors of said defendant, the Bank of ....., who may choose to join with them, to amend the original complaint herein, by joining with said defendant Bank of ..... the other defendants above named, and by setting forth the facts herein alleged, and that this amended complaint is made and filed by virtue of the leave so granted.

VI. Plaintiffs further allege, upon information and belief, that at the time the said defendant Bank of ..... ceased doing business as aforesaid, it was possessed of certain assets, the amount of which these plaintiffs are unable to state; but plaintiffs allege, upon information and belief, that the liabilities of said defendant, the Bank of ..... at that time, and for a long time prior thereto, was largely in excess, not only of the amount of such assets, but in addition thereto, of the sum of the amounts unpaid on its capital stock, the statutory liability of its stockholders, and the aggregate dividends paid to them, as hereinafter alleged.

VII. Plaintiffs further allege, upon information and belief, that at the time said defendant, the Bank of ..... was organized and commenced business, as aforesaid, the capital stock of the said bank was the sum of ..... dollars, divided into .... shares of the par value of ..... dollars each, and that all of said stock was subscribed for, and issued

to, the following named persons, who respectively subscribed for, received, and became the owners of the number of shares of stock set opposite their respective names [*give names of subscribers, and number of shares of stock subscribed for by each*]. That the said several persons to whom said stock was so issued [excepting said X.... Y....] severally paid for said stock so subscribed for and issued to them respectively, ... per cent of the par value thereof, and no more [and that the said X.... Y.... never paid for any portion of the stock so issued to him]. [That on or about the .... day of ....., 19.., the said Q.... R.... transferred to the said S.... T.... the .... shares of stock theretofore owned by the said Q.... R....]

IX. That the stock of said defendant, the Bank of ..... continued unchanged in ownership and amount until on or about the .... day of ....., 19.., at which time, at an annual meeting of the stockholders of said defendant Bank of ..... the capital stock of said bank was increased from ..... dollars to ..... dollars, and such increased stock was divided into .... shares of the par value of ..... dollars each, and that on or about said last named date there were issued to the several persons then holding the original stock in said bank certificates of stock equal in number of shares and amount to the certificates of original stock held by said several persons at said time respectively, and that following such increase in the capital stock of said bank, the ownership of the entire capital stock of said bank was as follows, to-wit [*give names of stockholders and the number of shares held by each*]. That none of the persons to whom were issued said .... shares of increased stock ever paid for any portion of the same.

X. That on or about the .... day of ....., 19.., the said U.... V.... assigned to the said S.... T.... the .... shares of stock then held by the said U.... V.... [*allege other transfers of stock, if any*]. That the said transfers were entered upon the books of said bank at or about the time thereof. That no other changes occurred in the ownership of said stock, except that upon the death of W.... Z.... above named, which occurred on or about the .... day of ....., 19.., the .... shares then held by him were a part of his estate, and thereafter and on or about the .... day of ....., 19.., by proceedings had to administer and divide

the estate of the said W.... Z...., deceased, said .... shares of stock were transferred to the said I.... N...., and the estate of the said W.... Z.... was duly settled, and that the said I.... N.... has ever since remained the owner thereof, and his ownership thereof since said last named date has duly appeared on the books of said bank; and except that [*allege other changes in ownership by descent or devise, if any*] and except that in or about the year 19.. there was issued by said defendant the Bank of ....., ... shares of the stock thereof in addition to all of the shares hereinbefore mentioned, to the said defendant S.... T...., and that no part of the said .... shares so issued were paid for, and that thereafter, but at what date these plaintiffs are unable to state, the said S.... T.... assigned and transferred to the said defendant C.... N.... Bank .... shares of said stock of the said defendant Bank of ....., and that the transfer last mentioned was entered on the books of said Bank of ....., and that the said C.... N.... Bank has ever since held and owned the shares of stock so transferred to it.

XI. Plaintiffs further allege, upon information and belief, that in pursuance of law, and of the by-laws of said defendant, the Bank of ..... there was duly elected from year to year, a board of directors, to administer the affairs of said bank. That at the annual meeting of the stockholders of said bank, held on or about the .... day of ....., 19.., there were duly elected as directors of said bank the said [*naming the elected*], and that said persons were from year to year duly re-elected and continued to act as such directors until the annual meeting of the stockholders of said bank held in ....., 19.., at which time W.... Z.... was elected a director of said bank in the place of the said Q.... R...., the other members of said board of directors being re-elected, and that each year thereafter, down to and including the year 19.., the same persons were re-elected and acted as directors of said bank. That in the fall of the year 19.. [*allege other changes in the board of directors, if any, whether by death or otherwise*] and that thereafter all of said board acted as the board of directors of said bank down to the time it closed its doors, and the receiver was appointed therefor, as hereinbefore alleged.

XII. Plaintiffs further allege, upon information and belief, that from the time of the organization of said bank down to the .... day of ....., 19.., the said Q.... R...., U.... V.... and X.... Y.... were from year to year elected president, vice-president, and cashier of said bank, respectively, and respectively acted in such capacities. That at the annual meeting of the stockholders of said bank held on said .... day of ....., 19.., Q.... R...., X.... Y.... and W.... Z.... were elected president, vice-president, and cashier of said bank, respectively, and continued to act in such capacities, respectively, down to [*allege additional changes in the officers of the bank, whether caused by death, resignation, or otherwise*] and that thereafter and down to the time when said bank closed its doors, and a receiver thereof was appointed, as hereinbefore alleged, the said Q.... R.... and W.... Z.... continued to act as president and cashier of said bank, respectively.

XIII. The plaintiffs further allege, upon information and belief, that on or about the 1st days of May and November, for and during the years 19.., 19.. and 19.., and on or about the 1st day of November in the years 19.., 19.. and 19.. the board of directors of said bank, as the same was constituted at said several times, voted, declared and paid a semi-annual dividend of .... per cent on said .... thousand dollars of the capital stock of said bank, and that each of the persons who were directors of said bank at the several times when said dividends were declared, voted to declare and pay the same, and that the dividends of 19.., 19.., 19.., 19.., 19.. and 19.. were directed to be declared and paid by the stockholders of said bank, at meetings thereof duly assembled, and that not only such of the stockholders of said bank as were directors thereof at said several times voted to declare and pay said dividends, but that said stockholder defendant A.... X...., and others of said stockholders at said several times whom plaintiffs cannot now state, voted that said dividends, or some of them, be declared and paid. That said several dividends, so declared and voted, were paid to the different stockholders of said defendant Bank of ....., including said directors thereof, according to their respective shares, and that they were received by them respectively at or about the time at which said dividends were respectively declared [excepting that said divi-

dent of the 1st day of November, 19.., was not paid until on or about January 1, 19..] That at the time when said several dividends were declared and paid, as aforesaid, only .... per cent of the original ..... dollars of the capital stock of said bank, and no part of the increased ..... dollars of the capital stock thereof, had been paid in, and that said bank was insolvent, and known to be so by said several directors and stockholders who voted to declare and pay said dividends, and that to the knowledge of said directors and stockholders who so voted said dividends, there were no profits earned by said defendant, the Bank of ..... properly applicable to the payment of said dividends, and that, to the knowledge of said several directors and stockholders, the payment thereof impaired and diminished the capital of said defendant Bank of ....., and that no portion of the net earnings or income of said bank had, prior to the declaring or payment of any of said dividends, been invested in additions to the property of the said bank, and the property thereof had in no manner been increased in value, and that at the time each of said several dividends were so declared and paid as aforesaid, a large portion of the identical debts which said defendant Bank of ..... owed at the time of the commencement of this action, and which it still owes to its creditors, existed, and was then due and owing from said bank to the same creditors.

XIV. Plaintiffs further allege, upon information and belief, that said defendant, the Bank of ..... had become and was insolvent as early as the .... day of ....., 19.., and so continued to be wholly insolvent until it closed its doors and ceased doing business, on the .... day of ....., 19.., as aforesaid, and that such insolvency of said bank was well known to said several persons who had acted as officers and directors thereof since said .... day of ....., 19.., as aforesaid. That it was the duty of said several persons who so acted as officers and directors of said bank as aforesaid, at all times they were acting as such, to examine into the affairs and conditions of said bank, and to see that said bank was managed carefully and prudently, and that its funds were not lost, wasted, stolen or squandered, or loaned upon worthless or insufficient security. That said several persons who had so acted as officers and directors of said bank, since said .... day of ....., 19.., as herein-

before set forth, and each of them, have grossly neglected to perform their official duties as such officers and directors. That by section .... of article .... of the by-laws of said bank it was provided that the board of directors thereof should require adequate security from the officers and agents thereof for the faithful performance of the trusts and duties reposed in and upon them. That notwithstanding said by-law, and notwithstanding their duty as such officers and directors, said several persons who had so acted as such, failed and neglected to obtain, or take, from any of the persons who had acted as president, vice-president, or cashier, or otherwise as an officer or agent of said bank, any bond, or undertaking, or security of any kind, for the faithful performance by said several officers or agents of said bank of their trusts and duties as such. That said officers and directors have negligently permitted various persons and corporations, who were insolvent and irresponsible, to overdraw their accounts to large amounts, without security, and have negligently permitted the money of said bank to be loaned to irresponsible persons and corporations, without adequate security, whereby said money was lost. That they have negligently and carelessly loaned the money and assets of said bank running for an unreasonable length of time, and at a rate of interest largely below the prevailing rate of interest, and have negligently and carelessly permitted large amounts of such paper to run until the same was long past due, and have negligently and carelessly omitted to take proper steps for the collection or securing of the same, and have allowed such securities to become wholly worthless, and the moneys loaned thereon wholly lost. That they employed a cashier who was dishonest, unfaithful and incompetent, as they had reason to know and did know, and who wasted, embezzled and stole large amounts of the funds of said bank. That they negligently and carelessly permitted such cashier to pay exorbitant rates of interest upon deposits, and upon certificates of deposit for funds and moneys deposited in said bank. That they negligently permitted such cashier, and other employees of said bank, to make false entries upon the books of said bank, particularly by making it appear on said books, and from such entries, that certificates of deposit issued for and on account of moneys deposited in said bank had been paid, when

in truth and in fact they had not been paid, thereby deceiving the bank examiner of the state, and inducing him to make reports of the condition of said bank, which were misleading and deceiving, and thereby inducing the depositing of money in said bank upon the faith of such reports, by many persons, including some of the present creditors of said bank, and that by reason thereof the liabilities of said bank were greatly swelled, to the injury of the present creditors and depositors of said bank. That they negligently and knowingly permitted the president and cashier of said bank to make and transmit on the first Monday of January and July, in each year, to the state treasurer, false and fraudulent reports relative to the condition of said bank, and to file copies thereof in the office of the register of deeds of said ..... county, on the first Monday of January and July, in each year, wherein the assets of said bank were stated to be largely in excess of the real assets thereof, and the debts and liabilities thereof were stated to be largely less than the actual debts and liabilities thereof, at the time when said reports were, from time to time, so made and filed, and that by reason of the making and filing of said false, misleading and fraudulent reports, large sums of money were deposited in said bank, and extensive credit given to said bank by many persons, including some of the present creditors of said bank, upon the faith thereof, and the liabilities of said bank have been thereby greatly swelled, to the injury of all the existing creditors thereof. That in or about the months of ..... and ..... for and during the years 19.. and 19.. reports were made by said bank, in accordance with Chapter 94, Wisconsin Statutes of 1913, and that said reports purported to truly state the condition of said bank, and the resources and liabilities thereof, and that each of said reports was sworn to by one of the officers of said bank, and that said report for the year 19.. was attested as correct by said defendants S.... T...., Q.... R.... and U.... V...., and that said report for the year 19.. was attested as correct by said defendants W.... Z.... and S.... T...., and that the same were so sworn to by said officer and attested by said directors, and permitted to be sworn and attested and filed as aforesaid, by the other officers and directors of said bank, notwithstanding the knowledge of such officers and directors of said bank, of the condition

thereof as aforesaid, and that such reports were false, misleading and fraudulent, to the knowledge of such officers and directors, and that the resources of said bank were stated therein to be largely in excess of the actual resources thereof, and that the liabilities of said bank were stated therein to be largely less than the actual liabilities thereof, and that by reason of the making and filing thereof large sums of money were deposited in said bank, and extensive credit extended thereto, by many persons, including some of the present creditors of said bank, upon the faith thereof, and the liabilities of said bank thereby largely increased, to the injury of the present depositors and creditors thereof. That shortly after the capital stock of said bank had been increased from ..... dollars to ..... dollars, the then directors of said bank, pretending to claim that said bank had from the time of its organization earned the sum of ..... dollars, and that it then had a surplus of ..... dollars, voted, declared and directed that said sum of ..... dollars be used for the purpose of paying the balance then due from the owners of the original ..... dollars of the stock of said bank upon their subscriptions, and that the balance remaining of said ..... dollars after said application should be applied towards the payment of the additional ..... dollars of capital stock issued during said year 19.., and that again, and in the year 19.., the said directors of said bank, claiming that the said bank, between the years 19.. and 19.. had earned the sum of ..... dollars as profits, or had a surplus amounting to that sum, voted, declared and directed that said sum of ..... dollars should be used and appropriated for the payment of the balance due for said additional ..... dollars of stock, and that said sum of ..... dollars and said sum of ..... dollars were so used and appropriated, although said directors well knew, as the fact was and is, that at said times when said sums were respectively applied to the payment of said stock, said bank had not earned the amount thereof, nor any amount whatever, and had no surplus, and that the application of said sums impaired and reduced the assets of said bank, to the benefit of said directors and other stockholders of said bank who received the same, and to the prejudice of the existing creditors of said bank, some of whom were creditors thereof at the time said different amounts

were appropriated and used for the payment of said stock, and that the officers of said bank, since the time when said pretended earnings were so appropriated and used, though well knowing the facts aforesaid, have negligently and carelessly allowed it to be published and stated that said bank had in fact a surplus, and that the capital stock thereof had been fully paid, and that thereby many persons, among whom were some of the present creditors of said bank, were induced to deposit money therein, and extend credit thereto, to the injury of these plaintiffs and all the present creditors of said bank. And that officers and directors have so carelessly and negligently managed and conducted the affairs of said bank that such part of the capital stock thereof as was in fact paid in has been wholly lost, wasted, squandered, embezzled and stolen, together with over ..... dollars of the deposits in said bank, and that the present assets of said bank will pay but a very small percentage of the present indebtedness of said bank to its depositors and creditors.

WHEREFORE plaintiffs pray that said defendant, the Bank of ..... be adjudged to be severally indebted to these plaintiffs respectively, for the amount of their respective claims, as hereinbefore set forth, together with interest thereon from said .... day of ....., 19.. [*date when the bank closed its doors*] and that each and every of said defendant stockholders be adjudged to be liable to the plaintiffs, and all creditors who are, or may become, parties to this action, for the balance unpaid upon the stock owned and held by said shareholders respectively, and in addition thereto for the amount of stock owned by them respectively at the time of the commencement of this action, and within six months next prior thereto, and for the amount of the dividends paid to said stockholders respectively, with interest thereon from the time of such payment; that said defendant bank, its officers, directors, stockholders and agents, be restrained by the order of this court from exercising any of its corporate franchises, and from receiving any debts or demands due to said defendant bank, and from paying or transferring to any person any of its moneys or credits until the further order of this court; that the receivership of the property, moneys and effects of said bank be continued; that all other creditors of said bank be required to exhibit their claims, and become parties to this action;

that a final judgment herein may be rendered according to law, and that thereupon the court cause to be made an equitable distribution of the property of said bank, and of the proceeds thereof, to its creditors; that if such property be insufficient to discharge the debts of said bank, the court, by order and judgment, compel the stockholder defendants to pay in the amount due and unpaid on the shares of stock held by them, or so much thereof as may be necessary; that if the debts of said bank still remain unsatisfied, that the court ascertain the respective liabilities of said stockholder defendants, and determine the amount payable by each, and enforce such judgment as in other cases; that each stockholder defendant be adjudged to repay each and every dividend received by him, with interest from the time such dividends were paid; that said officers and directors be adjudged to pay all the dividends declared and paid as hereinbefore set forth, to the present creditors of said bank, who now or may become parties to this action; that said officers and directors be adjudged to pay all the remaining indebtedness of said bank, to the creditors thereof, who are now, or may become parties hereto; and that such other and further relief be granted as may be just and equitable; and that plaintiffs have the costs and disbursements of this action.

1700. Amended complaint in creditor's action against insolvent bank and its officers, to sequestrate property and enforce statutory and common law liabilities of the stockholders and officers (sustained in Hurlbut v. Marshall, 62 Wis. 590; 22 N. W. 852).

The above named plaintiff, in his own behalf and in behalf of all other creditors of said defendant ..... Bank, who choose to come in and be made parties hereto, by this, the amended complaint herein, shows to this court:

I. That the said defendant, ... Bank is and for several years last past has been a banking corporation, with banking powers, duly organized, existing and doing business as a bank in the city of ....., in the state of ....., under and by virtue of the laws of said state.

II. That said corporation is indebted to this plaintiff in the sum of ..... dollars, being a balance of several sums

deposited by this plaintiff in said bank on and between the .... and .... days of ....., 19.., aggregating the sum of ..... dollars. That said deposits were made as aforesaid in the usual course of business. That payment of said balance has been duly demanded of said defendant bank by this plaintiff, and payment thereof refused, and that no part thereof has been paid. That said defendant is also indebted to a large number of persons other than this plaintiff, whose names and the respective amounts due to each are unknown to this plaintiff. That the aggregate amount of said other indebtedness exceeds the sum of ..... dollars, as this plaintiff is informed and believes. That this action is brought in behalf of this plaintiff and in behalf of all other creditors of said defendant bank who may choose to come in and be made parties hereto or become interested herein.

III. That said defendant has closed its banking office, and has become and is insolvent. That it has a large amount of assets, consisting of cash, choses in action, and other property to an amount unknown to this plaintiff, but less in value in the aggregate than the aggregate amount of its indebtedness. That said choses in action and other property ought to be converted into cash and applied to the payment of its indebtedness.

IV. The plaintiff further alleges that ever since the .... day of ....., 19.., the said banking corporation has been wholly insolvent, and that during the whole of said period, while its liabilities have exceeded ..... dollars, the value of its assets has been less than ..... dollars. That during the whole of said period the said defendants [*naming the directors*] were the directors of said corporation, and stock holders owning stock therein to the amount hereinafter stated. That the capital stock of said corporation, as fixed by its articles, and certificate of organization, was and is ..... dollars, divided into .... shares of ..... dollars each. That notwithstanding such insolvency, the said directors, knowing thereof, as plaintiff is informed and believes, on the .... day of ....., 19.., and semi-annually thereafter, up to and including the .... day of ....., 19.., voted, declared and paid dividends of .... per cent on said ..... dollars of capital stock, and each of said directors voted for each and every of said dividends, and received the same on their respective shares of capital stock as

hereinafter stated, without having any reason to believe there were sufficient net profits properly applicable thereto to pay said dividends. That said votes of said directors declaring said dividends, when said corporation was insolvent as aforesaid, diminished and impaired the capital and the capital stock of said corporation, and that there was never any net profits of said corporation or its business applicable to the payment of said dividends or either of them. That, as plaintiff is informed and believes, neither of said directors ever paid in full for their said shares of said capital stock. That "Schedule A" hereto annexed and made a part hereof, shows the names of the defendant stockholders and the number of shares owned and held by each at the time of the declaration and payment of each of said dividends, and the amount of dividends paid to and received by each of said stockholders on each declaration of dividend as aforesaid.

V. The plaintiff further alleges that on the .... day of ....., 19.., the defendant H.... S.... owned .... shares of said capital stock, etc. [*give the names of the stockholders and number of shares owned by each*]. That the ownership of said stock at the time of the commencement of this action was and still is the same as on said .... day of ....., 19.., except that said L.... N.... in form transferred his said .... shares to said H.... S.... on or about the .... day of ....., 19... That, as the plaintiff is informed and believes, said transfer last mentioned was not made in good faith but with the intent on the part of said L.... N.... and H.... S.... to release said L.... N.... from liability as a shareholder of said corporation, and with full knowledge on their part of the insolvency of said bank.

VI. The plaintiff further alleges that at the time each of said dividends was declared and paid as aforesaid a large portion of the identical debts which said corporation owed at the time of the commencement of this action and which it still owes to its creditors, existed and was then due and owing from said corporation to the same creditors, and that said portion ever since the .... day of ....., 19.., has exceeded the sum of ..... dollars.

VII. That during all the time from the .... day of..... 19.., to the commencement of this action, said H.... S.... was president and said L.... N.... the cashier of said corporation. That, as plaintiff is informed and believes, during

said last mentioned period said H.... S.... fraudulently converted more than ..... dollars of the funds of said bank to his own use, and replaced the same with old and worthless bonds and securities, and said president and cashier, knowing said bonds and securities to be worthless, reported the same in their annual reports and statements filed with the register of deeds and state treasurer during all of said period as of their full face value.

VIII. That during all of said period from the .... day of ....., 19.., to the commencement of this action the said directors of said banking corporation grossly neglected to perform their official duties as such directors, and negligently permitted the money, property and effects of said bank to be stolen, wasted and squandered. That they negligently permitted various persons and corporations, who were insolvent and irresponsible, to overdraw their accounts to a large amount without security, and negligently permitted the money of said bank to be loaned to irresponsible persons and corporations without adequate security, whereby said money was lost, and negligently permitted the said president to steal and embezzle the funds and securities of said bank and to use them for his own purpose; and that said directors so carelessly and negligently conducted the affairs of said bank that its entire capital surplus, property and effects, and more than ..... dollars of its funds, with which to pay its creditors, were stolen and lost, whereby it became and is utterly insolvent and unable to pay its creditors more than .... cents on the dollar of its indebtedness.

WHEREFORE the plaintiff prays that said banking corporation be adjudged to be indebted to the plaintiff in the sum of ..... dollars; that each and every of said defendant stockholders be adjudged to be liable to the plaintiff, and all creditors who shall become parties hereto, on account of their indebtedness to the amount of stock owned by them respectively at the time of the commencement of this action and within six months next prior thereto; that said corporation, its officers, agents, stockholders and directors be restrained by the order of this court from exercising any of its corporate franchises and from receiving any debts or demands due said bank, and from paying or transferring to any person any of its moneys or effects until the further order

of this court. That a receiver may be appointed to take possession of all the moneys, property and assets of said defendant bank, with the usual and full powers of a receiver in such cases; that this court fix a time within which all the other creditors of said bank shall be required to exhibit their claims and become parties hereto; that a final judgment herein may be rendered, according to law, and that thereupon the court cause to be made an equitable distribution of the property of said bank and of the proceeds thereof to its creditors; that if such property be insufficient to discharge the debts of said bank the court, by order and judgment, compel each stockholder defendant to pay in the amount due and unpaid on the shares of the stock held by him, or so much thereof as may be necessary; and, if the debts of said bank shall then remain unsatisfied, that the court ascertain the respective liabilities of said stockholder defendants, and determine the amount payable by each, and enforce such judgment, as in other cases; that each stockholder defendant be adjudged to repay each and every dividend received by him since and including the .... day of ....., 19.., with interest from the time said dividends were paid; that said directors be adjudged to pay all the dividends declared and paid, as hereinbefore set forth, to the present creditors of said bank who shall become parties hereto, and whose debts existed at the time each and every or any of said dividends were declared and paid; that said directors be adjudged to pay all the debts of said bank now existing which also existed at the time each and every or any of said dividends were declared and paid; and said directors be adjudged to pay all the indebtedness of said bank owing to the creditors thereof who shall become parties hereto; and that such other relief be granted, as may be just and equitable, together with the costs and disbursements of this action.

1701. Complaint by creditor of insolvent business corporation to enforce liability of stockholders for wages due employees under Wis. stats. 1913 sec. 1769 (adapted from complaint in Sleeper v. Goodwin, 67 Wis. 577; 31 N. W. 335).

The plaintiff, who brings this action on behalf of himself and all other judgment creditors of the C.... D.... com-

pany whose executions have been returned unsatisfied and whose judgments have been rendered for demands due from said corporation to clerks, servants and laborers for services rendered within the period of six months, respectively, and who wish to come in and become parties to this action, complains of the defendants, and alleges:

I. That the defendant, the C.... D.... company, was incorporated under the laws of the state of ..... on the .... day of ....., 19.., with a capital stock of ..... dollars, for the purpose of manufacturing wagons, farming tools, etc., and that on or about the .... day of ....., 19.., the capital stock of said corporation was duly increased to ..... dollars. That immediately upon its incorporation, as aforesaid, the defendant corporation proceeded to carry out the purpose of its organization until, on or about the .... day of ....., 19.., when it became insolvent and suspended business, and that it was not and never has been a railroad corporation.

II. That on or about the .... day of ....., 19.., said company hired the plaintiff to perform services in its shop in the business of making wagons; that the plaintiff continued to work for the company as a laborer or servant from that time until the .... day of ....., 19.., at which time the company was indebted to plaintiff for labor and services performed by him in the sum of ..... dollars, and that no part of the same has ever been paid; that said sum was wholly due and earned within a period of six months immediately preceding said .... day of ....., 19..; that on the .... day of ....., 19.., plaintiff commenced an action against said corporation upon the aforesaid demand and on the .... day of ....., 19.., at a special term of the ..... court for the county of ..... obtained a judgment of ..... dollars on account of said claim and interest thereon, with ..... dollars, costs of suit; that an execution was duly issued out of said court upon said judgment, and placed in the hands of the sheriff of ..... county, who on ....., 19.., returned the same wholly unsatisfied.

III. That on the .... day of ....., 19.., the C.... D.... company had become greatly embarrassed financially, and indebted to the amount of about ..... dollars; and on the .... day of ....., 19.., duly assigned to L.... M...., of ....., state of ....., all and singular its real

and personal property, chattels, choses in action, books and papers in trust that he should take possession of such property, and sell and dispose of the same, and convert the same into money, and collect, recover and get in all due bills, securities, notes and accounts of said company, and out of the proceeds to pay the reasonable expenses of his trust with a reasonable compensation to himself, and out of the residue, if sufficient, to pay the debts in full; if not sufficient, to pay them ratably, without preferences; that said assignee duly gave his bond to faithfully execute the duties of his trust, which bond with a true copy of the assignment was filed in the office of the clerk of court for ..... county, on the .... day of ....., 19..; that said assignee duly endorsed on said copy of assignment, his consent to take upon himself the duties of his trust, and a certificate that the same was a true copy of the original; that within ten days thereafter said assignee filed in the office of said clerk a correct inventory of the assets of the corporation, and a list of its creditors, with amount due to each, verified and certified as required by law; that said assignee took possession of said property on the .... day of ....., 19.., and still is such assignee, still engaged in performing the duties of his said trust; that he has collected all the demands and accounts due to said company, or has converted or disposed of the same, and that said company has no property or effects of any kind other than those which the said assignee has already collected or disposed of, or is now engaged in collecting; that the time of making assignee's final report has been extended from time to time by the ..... court for ..... county; and that said assignee has not filed the same as yet.

IV. That by the articles of association the capital stock of said corporation was ..... dollars, divided into shares of ..... dollars each; that at the time of incurring the company's debt to the plaintiff, and down to the present time, and at the time of the rendition of the judgment above set forth, and at the date of the commencement of this action I.... D...., of ....., state of ....., was a stockholder in said corporation, holding .... shares of stock therein, to the amount of ..... dollars.

WHEREFORE plaintiff prays judgment for the discovery of all persons who may be stockholders, that when so discovered they may be made parties to this action; that the

stockholders be adjudged to pay into court an amount equal to their capital stock respectively, or so much as may be necessary to discharge the sum of ..... dollars, with interest thereon from the .... day of ....., 19.., together with the sum of ..... dollars, costs of said execution and return, and that the plaintiff may have such other or further relief in the premises as shall be just, together with costs.

1702. Complaint by creditor against insolvent bank and stockholders to enforce additional liability of stockholders under the banking law (adapted from complaint in Booth v. Dear, 96 Wis. 516; 71 N. W. 816).

The plaintiff, for himself and on behalf of all other persons who are creditors of the said defendant C.... N.... Bank who may in due time come in and seek relief by and who shall contribute to the expenses of this action, for an amended complaint complains of the said defendants and alleges:

I. That the said defendant, C.... N.... Bank, is now and was at all times herein mentioned, a banking corporation created and existing by virtue of and under the laws of the state of Wisconsin, organized pursuant to an act entitled, "An Act to Authorize the Business of Banking," approved ....., 19.., being Chapter .... of the Laws of 19.., and acts amendatory and supplemental thereto.

II. That the amount of its capital stock is ..... dollars. That the said capital stock is divided into .... shares, each share being of the face or par value of ..... dollars. That its place of business is the city of ....., in the county of ....., in the state of ....., and that prior to the .... day of ....., 19.., it was actively engaged in, and was carrying on a banking business in the said city of ....., but that on the said .... day of ....., 19.., it duly made a voluntary assignment of all its property, credits, and effects of every description, to one ..... Trust Company, pursuant to Chapter .... of the .... statutes of the state of ....., and acts amendatory and supplemental thereto. That the said ..... Trust Company immediately qualified as such assignee, accepted the trust imposed thereby and entered on the execution thereof. That at the time the said assignment was made the C.... N.... bank was indebted to the

state of ..... in the sum of ..... dollars, that it was indebted to the city of ..... in the sum of ..... dollars, and that it was indebted to divers other creditors in various sums, amounting in all to a total indebtedness of ..... dollars. That the entire assets of the said bank assigned as aforesaid did not then and do not now exceed in value ..... dollars. That at all times since the date of the said voluntary assignment the banking office of the said C.... N.... Bank has been closed and it has done no business. That it has no property, credits, or effects of any description subject to execution, or which can be reached by action at law, or which can be sequestrated in an action in equity, and that it is wholly insolvent.

III. That all the said defendants, other than the said C.... N.... Bank, are now and were within the six months next preceding the date of the commencement of this action, and while the indebtedness hereinafter described existed, stockholders in the said corporation, and that each of them now holds or has held within the said six months the number of shares of stock therein, and of the par value set opposite his name, to-wit, [*give names of stockholders, number of shares held by each, and par value.*] That the persons herein named as stockholders are all the persons that this plaintiff has been able to discover who hold stock in said corporation, or who are liable as stockholders therein, and this plaintiff alleges, on information and belief, that they are all the persons who own stock, or who are liable as stockholders therein.

IV. That on the .... day of ....., 19.., at and before the time the said C.... N.... Bank made the said assignment and ceased to do business, as aforesaid, this plaintiff had on deposit with the said C.... N.... Bank, which had been deposited by this plaintiff in the usual course of business, and which was subject to check, the sum of ..... dollars and .... cents, for which sum the said C.... N.... Bank was then and is now indebted to this plaintiff.

V. That this plaintiff has duly filed with the clerk of the ..... court in and for said county an affidavit setting forth the nature, consideration and amount of his said debt on account of his said deposit with said bank, over and above all setoffs, and in accordance with section No. .... of ..... Statutes of the state of ....., and that no dividend has been paid thereon.

VI. That on the .... day of ....., 19.., one O.... P...., Esq., a justice of the peace in and for said county of ....., and state of ....., while sitting as such justice of the peace, duly rendered a judgment in favor of one W.... X.... and against the said C.... N.... Bank, for the sum of ..... dollars and .... cents, exclusive of costs, and for ..... dollars and .... cents costs, in all for the sum of ..... dollars and .... cents. That said judgment was rendered upon an indebtedness contracted by the said C.... N.... Bank on the .... day of ....., 19.. That on the .... day of ....., 19.., a transcript of the said judgment was duly filed in the office of the clerk of the ..... court in and for the said ..... county, and that the said judgment was duly docketed in the said office against the said defendant on the said .... day of ....., 19.. That an execution against the property of the said C.... N.... Bank was, on the .... day of ....., 19.., duly issued from the said ..... court upon the said judgment, and on the .... day of ....., 19.., delivered to the sheriff of said ..... county, and that on the .... day of ....., 19.., the said sheriff duly returned the said execution wholly unsatisfied for want of property to apply thereon. That on the .... day of ....., 19.., the said W.... X.... duly assigned to this plaintiff this said judgment, and all his rights thereunder, and that this plaintiff is now the lawful owner thereof. That there is now due and owing to this plaintiff from the said C.... N.... Bank upon said judgment the sum of ..... dollars and .... cents, together with the sum of ..... dollars subsequent costs thereon, in all the sum of ..... dollars and .... cents; and that there is now due and owing to this plaintiff from the said C.... N.... Bank on account of the said deposit and the said judgment the total sum of ..... dollars and .... cents, over and above all setoffs and counterclaims.

VII. That this plaintiff is informed and verily believes, and alleges the fact to be, that some of the said defendant stockholders have within the six months last past transferred a portion of their stock to irresponsible persons for the sole purpose of avoiding their individual statutory liability to creditors, and that this plaintiff verily believes that unless their stockholders' liability is fixed, others will transfer their

stock to irresponsible persons for the same purpose, and that loss to creditors will result therefrom.

WHEREFORE this plaintiff prays judgment: (1) That all other persons who are creditors of the said C.... N.... Bank, and who in due time manifest a desire to come in hereunder, and who contribute to the expense of this action, be made parties plaintiff herein, and that they be allowed to prove their claim herein and to participate in the proceeds of this action. (2) That all other persons, if any there be, be discovered who own stock in said corporation, or who have owned stock therein the six months last past, or who have transferred their stock for the purpose of escaping their individual statutory liability to creditors of the said corporation, or who for any other reason are liable as stockholders to said creditors, and that when so discovered, they be made parties defendant herein. (3) That judgment be entered against the said defendant, C.... N.... Bank, for the amount of this plaintiff's said deposit, with interest thereon, and for the amount of all other creditor's claims, with interest thereon, who may come in hereunder. (4) That the stockholders in said corporation, and all persons who are liable as stockholders to its creditors, together with the par value of stock owned by each, be adjudged, and that they be adjudged and decreed liable for the amount of this plaintiff's said claims and all other creditors' claims who may come in hereunder and who shall set out and prove their claims in this action, to a sum equal to the par value of stock held by them, or upon which they are liable, respectively, and that they and each of them be ordered to pay the same, or so much thereof as may be necessary to satisfy the said claims of creditors, together with the costs and disbursements of this suit, into court, for persons entitled thereto. Or that judgment be entered against the said stockholders for the amount of the claims of this plaintiff, and such other creditor's claims as may come in hereunder, not exceeding the amount of stock held by them, the said stockholders, and for interest and costs. (5) And for such other and further order, judgment or relief as to the court shall seem just and equitable. And this plaintiff will ever pray.

CHAPTER LXXVI.

COMPLAINTS IN ACTIONS AGAINST PROMOTERS OF CORPORATIONS.

1703. Complaint in action at law by corporation against promoters, to recover secret profits on real estate sold to the corporation.

1704. The same, in equity, to rescind sale and recover the entire purchase price.

1705. Complaint in action at law by corporation against promoters and third persons conspiring with them, to recover secret profits on real estate sold to the corporation.

1706. Complaint in equitable action by stockholders on behalf of corporation against fraudulent promoters where corporate officers refuse to sue.

1707. Complaint in action at law by stockholder to recover his individual damages resulting from the fraud of promoters.

Persons who purchase property or obtain an option thereon for the purpose of transferring it to a corporation to be formed, and who afterwards form such corporation and induce others to join therein and purchase stock therein, stand in a fiduciary relation to such corporation and its stockholders, and it is their duty to fully disclose their relationship to the property to their associates; and if they do not do so, but make a secret profit on the property by transferring it to the corporation at a price larger than they pay, the corporation may repudiate and rescind the contract and recover the whole purchase money, or may keep the property and recover the amount of the secret profits so made. Pittsburg Mining Co. v. Spooner, et al., 74 Wis. 307; 42 N. W. 259; Fountain Sp. Co. v. Roberts, 92 Wis. 349; 66 N. W. 399. The action may be brought by the corporation, or in case the governing body refuse to bring it, by the defrauded stockholders in equity, in behalf of the corporation.

The stockholders who are thus defrauded may also, in the absence of an action by the corporation, each sue at law and recover of the promoters his individual damages for the fraud, to the extent of the enhanced price he paid by reason thereof. Francy v. Warner, 96 Wis. 222; 71 N. W. 81.

1703. Complaint in action at law by corporation against promoters, to recover secret profits on real estate sold to the corporation (sustained in Pittsburg Mining Co. v. Spooner, 74 Wis. 307; 42 N. W. 259).

The above named plaintiff, which was on the .... day of ....., 19.., organized as a corporation under the laws of the state of ..... and is doing business as such, complains of the above named defendants, and shows to this court:

I. That on or about the month of ....., 19.., the defendants conceived the idea, and conspired and agreed together to promote the organization of the plaintiff corporation for the ostensible purpose of carrying on the business of mining iron ore on the Gogebic Range, so-called, in the state of ....., but for the real purpose of deceiving and cheating those who might deal with said company, and by such deceit enriching themselves at the expense of the company.

II. That in pursuance of their scheme the defendants obtained for the purpose of purchase by said company, temporary control of a mining option on said Gogebic Range, said option conferring the right on certain terms and conditions to prospect, explore and mine for iron ore on the .... half of the .... quarter of section ...., township ...., range .... in ..... county in the state of ..... Said option was owned by E.... & F.... of ..... in the state of ....., and the price demanded by them for it was ..... dollars and no more. And at that price the defendants acquired the right to buy it for a certain limited time. Having thus secured the temporary control of said option, for the purposes of said company, the defendants proceeded to obtain subscriptions to the capital stock of the proposed corporation to buy it.

III. That in order to induce subscriptions to said capital stock, the defendants among other things falsely and fraudulently stated and represented to divers persons, and to all persons who became and now are stockholders in said company, that the price demanded by E.... & F.... for said option was ..... dollars; that it could not be bought for any less; that the defendants were themselves desirous of buying it, but were unable pecuniarily to pay so much

money, but desired to organize a corporation to purchase it, in which they would themselves take stock to the extent of their ability and pay the same price for it that every one else would have to; that all stockholders would be in on the "ground floor"; that there was no speculation in the purchase price; that they, said defendants, were making nothing out of it, and desired to make nothing, not even their expenses, unless the company saw fit to reimburse them, except what all stockholders would make alike through the operation of the proposed company in mining the ores covered by said option; that it would be necessary for the company to raise ..... dollars in money, of which ..... dollars must be paid to E.... & F.... for the option, and ..... dollars should be held in the company's treasury for the purpose of development. In furtherance of said fraudulent scheme and conspiracy, the defendants drew up, and by said fraudulent representations procured to be signed a subscription paper of which the following is a copy [*insert copy of subscription paper*] that said paper was so signed by a large number of persons, agreeing to take shares in sufficient amount in the aggregate to cover the entire proposed stock of the projected corporation, to-wit: ..... dollars.

IV. That immediately after said stock had thus all been subscribed, and in pursuance thereof, on the ... day of ....., 19.., the defendants organized a corporation in all respects conformably to the laws of the state of ....., under the name of the A.... B.... Company, said corporation being the plaintiff herein. The defendants were the sole incorporators of said company, and as such held the first meeting of the company on the .... day of March, 19.., at ..... aforesaid, and all of them were present. The defendant, C.... D...., was at that meeting elected president of the company, and the defendant, J.... K...., treasurer, and as such they have continued to act during all the time covered by the facts herein alleged. At or about the time of said meeting, in further pursuance of said fraudulent scheme, the defendant J.... K.... by the advice and procurement of the defendants C.... D.... and E.... F...., but in the joint interest of all of them, subscribed for the entire stock of said corporation, to-wit, ... dollars, except one share each of ..... dollars, which were taken by the defendants C.... D.... and E.... F....

Thereupon the company, at the same meeting, by the unanimous vote of defendants, as sole corporators and directors, adopted a resolution of which the following is a copy:

"RESOLVED that in accordance with the subscription of J.... K.... to the capital stock of said company, the president and secretary hereof issue to him, or to such person or persons as he may direct, and in such number of shares as he may direct, all of the said stock except two shares thereof, one of which is held by said C.... D.... and the other by said E.... F...., the said stock to the said J.... K.... to be issued as paid up in full in consideration of his making and delivering to the president of the said corporation, for the said corporation, an assignment in writing, duly executed, of an option which he now owns on the .... half of the .... quarter of section ...., township ...., range ...., in ..... county, state of ....."

And plaintiff further says that none of said capital stock except ..... dollars thereof now held by the defendant J.... K.... was ever issued to him. That although he conveyed to the company the mining option hereinbefore mentioned, in nominal payment for all the stock so subscribed for by him, neither the defendant J.... K...., nor any of the defendants ever had, or held any valuable interests in said option above the price of ..... dollars, which had to be paid to E.... & F.... for the same; that said option having been procured and being held by the defendants or by the defendant J.... K.... for them, as promoters and trustees of said corporation, whatever value or interest they possessed or could possess therein inured to and was the property of said corporation when formed, without advance in price or other condition whatever, and the plaintiff avers that at that time ..... dollars was the full value of said option.

V. The plaintiff further represents that the said defendants, in further pursuance of said fraudulent scheme, and in order if possible to cover up and conceal the true nature of their transaction [but which it in fact discloses rather than conceals], after said subscriptions were obtained, caused said option to be conveyed to said defendant J.... K.... without [a dollar of] consideration; then caused the company to buy it of him for substantially its entire capital stock, caused

the agreement to take shares in the projected company, as hereinbefore set forth, to read as an agreement to take them of said J.... K.... and pay him for them instead of the company, and then issued the shares so fraudulently subscribed to the several persons who by the agreement aforesaid had agreed to take them, and collected from them the sum of ..... dollars, paid E.... & F.... the sum of ..... dollars for the option, kept ..... dollars in the treasury of the company, and fraudulently captured and converted the remaining ..... dollars to their own use, in violation of their duties to the company, as its promoters, trustees and directors, whereby your orator has been greatly damnified and sustained a loss of ..... dollars and upwards.

VI. The plaintiff further says that in procuring control of the mining option aforesaid, organizing the plaintiff corporation, securing subscriptions for its capital stock, collecting moneys thereon, paying for said option to E.... & F...., having it conveyed by them to the defendant J.... K...., and by him to the plaintiff, and in all other matters touching the organization of the plaintiff corporation and the purchase of said option, the defendants became and were promoters, agents and trustees of the plaintiff, a fiduciary relation of especial trust and confidence, whereby, and while so acting, they could not in law, by whatsoever specious pretext, pretense or contrivance, gain any personal profit or advantage over the plaintiff or make any valid contract with it, to its prejudice, and to their individual advantage.

VII. And the plaintiff further says that the amount paid to said E.... & F.... by the defendants, on behalf of the plaintiff was the sum of ..... dollars; that the amount obtained by the defendants from the company on the fraudulent pretext of said payment was ..... dollars, ... dollars of which the defendants have diverted from the company and fraudulently appropriated to their own use. For this amount they are justly indebted to the plaintiff as for so much money had and received to its use.

WHEREFORE the plaintiff demands judgment for said sum of ..... dollars, with interest and costs.

1704. The same, in equity, to rescind sale and recover the entire purchase price.

[*Follow substantially the allegations in the last preceding form, and add following allegation*]:

VIII. That the plaintiff was first informed of the truth in regard to the said sale of said land to said corporation, and that said defendants had so fraudulently procured to themselves an illicit and secret profit in said lands, as aforesaid, on or about the .... day of ....., 19.., and that since said date the plaintiff has in no manner ratified or affirmed said sale, but on the contrary thereof, on or about the .... day of ....., 19.., this plaintiff caused to be executed a quit-claim deed of said lands, running to the said defendants as grantees, and tendered the same to the defendants, and demanded of the defendants the return of the said consideration money so paid by the plaintiff, but the defendants refused and still refuse to accept said deed, or return said consideration.

WHEREFORE plaintiff demands judgment that the said sale and conveyance of said land to the plaintiff by said defendants be adjudged null and void, and that the same be rescinded; that the said defendants be adjudged and required to accept said quit-claim deed, and that the plaintiff recover of the defendants the said sum of ..... dollars, the consideration money paid for said land, with interest from the .... day of ....., 19.., and for such other and further relief as may be just and equitable with costs.

1705. Complaint in action at law by corporation against promoters and third persons conspiring with them, to recover secret profits on real estate sold to the corporation (sustained in Fountain S. P. Co. v. Roberts, 92 Wis. 345; 66 N. W. 399).

I. That at all the times hereinafter mentioned the plaintiff was and still is a corporation duly organized and existing under and by virtue of the laws of the state of .....

II. That, as plaintiff is informed and believes, for six months immediately preceding the .... day of ....., 19.., said defendants D.... M.... and D.... D.... were copartners in business under the name and style of M.... D.... Company, engaged in the business of buying and

selling real estate in the city and county of ....., state of .....

III. That, as plaintiff is informed and believes, during the months of ..... and ....., 19.., said defendants W.... D.... and H.... M.... conceived the idea and agreed together to promote the organization of the plaintiff corporation for the ostensible purpose of purchasing a certain tract of land and reselling the same at a profit, but in reality for the purpose of defrauding such persons as might become members of such corporation, or might deal with such corporation, and of defrauding such corporation, in the purchase of said land, and by so doing enriching themselves, as hereinafter fully set forth.

IV. That the said tract of land was known as the ..... tract, and was described as follows [*give description*].

V. That at said time one W.... Z...., of ....., state of ....., controlled said premises, by reason of owning a land contract, or option upon the same, according to the terms of which W.... & U.... of ....., state of ....., who were then the legal owners of said premises, agreed to convey said premises at a price of ..... dollars; that of said purchase price ..... dollars was represented by a mortgage which was then an incumbrance upon said premises; that said W.... Z.... had paid ..... dollars of said purchase price, and, as plaintiff is informed and believes, it was provided by the terms of said option or contract that said W.... & U.... would execute and deliver a warranty deed of said premises to said W.... Z.... or his assigns upon payment of ..... dollars, and accrued interest on said mortgage, and the execution of an additional mortgage of ..... dollars upon said premises; that the total cash payment necessary to be made under said contract or option to obtain a warranty deed of said premises was ..... dollars, and said interest.

VI. That, as plaintiff is informed and believes, said defendants D.... M.... and D.... D.... as such copartners, knowing of the fraudulent purpose and intention of said defendants W.... D.... and H.... M...., as above set forth, and in aid of said fraudulent purpose and intention, undertook and agreed with said W.... D.... and H.... M.... during the month of ....., 19.., to procure from said W.... Z.... said contract or option, and to use and

transfer the same as said W.... D.... and H.... M.... might desire and direct, in carrying out said fraudulent scheme, in consideration of receiving a share of the illegal profits to be made out of the subscribers to the stock of said corporation, or out of said corporation.

VII. That, as plaintiff is informed and verily believes, said defendants W.... D.... and H.... M.... thereupon prepared an agreement in writing, which provided in effect that the signer thereof agreed to pay the sums set opposite their respective names toward the purchase price of said premises hereinbefore described, at a price of ..... dollars.

VIII. That, as said plaintiff is informed and believes, said defendants W.... D.... and H.... M.... thereupon proceeded to procure subscribers to the stock of said proposed corporation, the plaintiff herein, and to procure signatures to said agreement, and in order to induce subscriptions to said stock, and to induce signatures to said agreement, represented to many and divers persons, and to all persons who became and who now are stockholders in said corporation, the plaintiff herein, that it was proposed to form a corporation or association for the purpose of purchasing said premises, and falsely represented to said persons that said premises were cheap at the price of ..... dollars; that the defendants W.... D.... and H.... M.... were themselves desirous of becoming stockholders in said corporation to buy said premises for said sum of ..... dollars, and that said defendants W.... D.... and H.... M.... would subscribe to said stock, and falsely represented that the price asked by the owners of said premises for the same was ..... dollars, of which ..... dollars would have to be paid in cash at the time of purchasing the same, and the balance, to-wit, ... dollars, could be secured by mortgage upon said premises; and falsely represented that said premises could not be bought for any less sum, and falsely represented that said W.... D.... and H.... M.... would make nothing out of said sale except as members of said corporation, and represented that they desired to secure enough signers of said agreement and enough subscribers to the stock of the proposed corporation, besides themselves, to make up the sum of ..... dollars necessary for the cash payment upon said premises.

IX. That said defendants W.... D.... and H.... M.... concealed from all persons to whom such representations were made, and from all who signed said agreement, and from all who became stockholders of plaintiff's corporation, that said premises could be bought for a less sum than ..... dollars, and concealed from all such persons that said defendants W.... D.... and H.... M...., or any of said defendants, would make, or intended to make, any profit whatever out of said transaction for themselves, except such profits as W.... D.... and H.... M.... might make as stockholders of said corporation.

X. That said defendants W.... D.... and H.... M...., thereupon circulated said subscription list or agreement, and by means of said false and fraudulent representations procured the signatures of many persons thereto for various amounts, all of whom agreed to take stock in said corporation, all of whom were induced to sign the same and induced to agree to take stock in said corporation to buy said premises, by said false and fraudulent representations so made to them by said defendants W.... D.... and H.... M....; that all of said persons are now stockholders of this plaintiff.

XI. That, as plaintiff is informed and believes, all the persons who became and all persons who now are stockholders and who agreed to take stock in said plaintiff corporation, and all persons who signed said agreement, with the exception of said defendants W.... D.... and H.... M.... were induced to become stockholders and to agree to take stock in the plaintiff corporation and to sign said agreement by means of said false and fraudulent representations so made by said defendants W.... D.... and H.... M.... and became said stockholders and signed said agreement in the belief that no profit would be made out of said premises, except such as might be made by all of said stockholders alike.

XII. That said defendant W.... D.... subscribed for stock in said plaintiff corporation to the amount of ..... dollars; that said defendant H.... M.... subscribed for stock in said corporation to the amount of ..... dollars.

XIII. That a sufficient number of persons signed said subscription list of agreement to make the total amount subscribed and agreed to be paid for the capital stock of said

corporation, and for the purpose of purchasing said land amounting to ..... dollars, inclusive of the amounts subscribed by said defendants, W.... D.... and H.... M....

XIV. That immediately after such subscription and such signatures had been secured, and during the month of ....., 19.., said defendants W.... D.... and H.... M.... represented to said subscribers or signers that it was necessary that the amounts respectively subscribed toward the purchase price of said premises or to said capital stock, be paid in at once to said defendants W.... D.... and H.... M.... in order to enable them to purchase said premises at said price, to-wit, ... dollars for the said corporation and for said stockholders; that relying upon and induced by such representations all of said subscribers paid said defendants W.... D.... and H.... M.... the whole amount of their respective subscriptions, amounting in the aggregate to the sum of ..... dollars, a large part thereof being paid in before the .... day of ....., 19.., and the whole thereof being paid in to said W.... D.... and H.... M... before the .... day of ....., 19..

XV. That, as plaintiff is informed and believes, at or about the time said defendants W.... D.... and H.... M.... were circulating said subscription list or agreement, and obtaining such subscribers and collecting said moneys the said defendant D.... D...., acting on behalf of the firm of M.... D.... Company, and pursuant to said agreement set forth in paragraph VI hereof, and with the knowledge and consent of said D.... M...., went to ....., state of ....., and purchased said contract upon said premises from said W.... Z.... for the sum of ..... dollars, and had said contract or option assigned to him by assignment on the back thereof signed by said W.... Z...., and returned to ....., state of ....., at or about the time said defendants W.... D.... and H.... M.... had procured said subscribers and had collected said moneys from said subscribers.

XVI. That, as plaintiff is informed and verily believes, said D.... D...., acting on behalf of said M.... D.... Company, shortly after he had returned to the city of ....., to-wit, on or about the .... day of ....., 19.., received from said W.... D.... and H.... M.... the sum of ..... dollars of the moneys collected from said subscribers in a

certificate of deposit on the ..... Bank of ....., and in pursuance of said agreement set forth in paragraph VI hereof, delivered and paid said certificate of deposit to said W.... & U.... as a partial payment under said contract or option. That, as plaintiff is informed and believes, at said time, or between said time and the .... day of ....., 19.., said defendant D.... D...., acting on behalf of said M.... D.... Company, assigned and transferred said contract or option by assignment thereof written on the back of said contract or option, and signed by said D.... D...., to said W.... & U...., and directed said W.... & U.... to execute and deliver the warranty deed of said premises to such person as said W.... D.... and H.... M.... might direct upon payment of the balance due under said contract or option. That, as the plaintiff is informed and believes, said W.... D.... and H.... M.... paid to said W.... & U.... in presence of said D.... D.... on or about the .... day of ....., 19.., the balance of the cash payment remaining due under said contract or option, to-wit, the sum of ..... dollars; that said sum of ..... dollars was the balance of the cash payment to be made under said contract or option, as set forth in paragraph V hereof.

XVII. That at the time said money was so paid to W.... & U...., as above stated, one J.... E.... was a signer of said agreement and had agreed to take stock of said proposed corporation to the amount of ..... dollars; that the said defendants W.... D.... and H.... M.... requested said J.... E.... to become the grantee in the deed of said premises from W.... & U...., the owners thereof, and to hold the title to the same to the benefit of said corporation, plaintiff herein, until the organization thereof could be perfected, and they represented to said J.... E.... that it was necessary to have some person to hold the title to said premises until said organization could be effected; that said J.... E.... consented to act as grantee in such deed for the benefit of said corporation, the said plaintiff herein, and said premises were thereupon conveyed to him by said W.... & U.... at the request of said W.... D.... and H.... M.... by a warranty deed, on or about the .... day of ....., 19..; that the consideration named in said deed was one dollar; that said J.... E.... never had any interest in said premises and never claimed any interest whatever in the same,

except as trustee for said corporation, and for the signers of said subscription list or agreement; that at said time said J.... E.... duly executed and delivered to said W.... & U.... his promissory note for ..... dollars, and duly executed and delivered to said W.... & U.... a mortgage upon said premises to secure said sum; that said note and mortgage were given to secure the payment of the balance of the purchase price of said premises, according to the terms of said contract or option mentioned in paragraph V hereof.

XVIII. That, as plaintiff is informed and believes, the total amount of the payments made for said lands to said W.... & U.... was the sum of ..... dollars, and the total amount paid to said W.... Z.... for his interest in said contract or option was ..... dollars, making the total amount paid by all of said defendants for said premises ..... dollars.

XIX. That, as plaintiff is informed and believes, at or about the time said last payment was made to said W.... & U...., to-wit, on or about the .... day of ....., 19.., said defendants W.... D.... and H.... M.... paid and turned over to said D.... D.... and D.... M.... ..... dollars out of the moneys collected from said subscribers as above set forth, as the share of said D.... M.... and D.... D.... of the illegal profits of said transaction, and pursuant to the agreement mentioned in paragraph VI hereof.

XX. That thereupon and in said month of ....., 19.., said defendants W.... D.... and H.... M.... proceeded to perfect the organization of said corporation, the plaintiff herein, and had the articles of incorporation thereof drawn up by their attorney; that said articles were signed by said W.... D.... and by two of said subscribers at the request of said W.... D.... and H.... M.... and were duly caused to be recorded as required by law, in the office of the register of deeds of ..... county, on the .... day of ....., 19.., and filed with the secretary of state of the state of ..... on the .... day of ....., 19..

XXI. That on or about the .... day of ....., 19.., said signers of the articles of incorporation met at the office of said W.... D.... in the city of ..... for the purpose of perfecting the organization of said plaintiff, at which time a large part of the subscribers to the stock of said plaintiff, or the signers of said agreement were also present; that the

minutes of said meeting had been prepared beforehand by said attorney of said W.... D.... and H.... M.... and the method of procedure at said meeting was directed by said W.... D.... and H.... M....; that a contract of subscription, of which the following is a copy, was written in the minutes of said meeting, so prepared beforehand, by said attorney, to-wit [*copy the subscription agreement*].

XXII. That said list was thereupon signed by such of the persons as were present of those who had subscribed to the first subscription list or agreement in the same amount as they had subscribed to said first subscription list or agreement, and amounted in the aggregate to ..... dollars; that the balance of said ..... dollars subscribed in said first list of agreement was subscribed at said time on said second subscription list by said J.... E...., acting at the request of said W.... D.... and H.... M.... for and in behalf of such of the subscribers to the said first list or agreement as were absent from said meeting; that said defendants W.... D.... and H.... M.... and said J.... E.... were thereupon elected as directors of said corporation, the plaintiff herein, and constituted the board of directors of said corporation; that a resolution was then passed, at the request of said defendants W.... D.... and H.... M...., authorizing and empowering said board of directors to purchase the premises hereinbefore described at the price of not to exceed ..... dollars; that said subscribers to stock were not aware that said premises had already been purchased for a cash payment of ..... dollars, as above set forth, but verily believed that the price of the same was ..... dollars, of which ..... dollars would have to be paid at once in cash.

XXIII. That said stockholders' meeting was then adjourned and a meeting of the board of directors, elected as aforesaid, and consisting of said W.... D.... and H.... M.... and J.... E.... was immediately held; that said W.... D.... was elected president, said J.... E.... vice-president, and said H.... M.... secretary and treasurer, at said directors' meeting.

XXIV. That thereupon and at the request of said W.... D...., acting as the president of the plaintiff, and of said N.... M...., acting as the secretary of plaintiff, said J.... E.... made and executed to plaintiff, and delivered to said

W.... D.... and H.... M...., acting as such officers of said plaintiff, a warranty deed of the said premises, wherein and whereby said J.... E.... conveyed said premises to said plaintiff, subject to said mortgage of ..... dollars and to said mortgage of ..... dollars; that the consideration recited in said deed was one dollar and other valuable consideration; that said J.... E.... received no consideration whatever for said premises, or for executing said deed; that he did not know what said defendants had paid for said premises; that said W.... D.... and H.... M.... had represented to him, and he verily believed that the purchase price demanded by said W.... & U.... for the same was ..... dollars, and that the said W.... D.... and H.... M.... had paid ..... dollars in cash for the same, leaving the balance of ..... dollars secured by mortgages, as above stated; that said J.... E.... had taken said conveyance merely as trustee for said corporation and for the accommodation of said plaintiff, and transferred said premises to plaintiff entirely without compensation to himself.

XXV. That said defendant W.... D...., acting as the secretary and treasurer of plaintiff, caused it to appear by the ledger and cash book of plaintiff, that ..... dollars in cash had been paid into the treasury of plaintiff from said subscribers to the capital stock of plaintiff, and acting as such secretary and treasurer, made false and fraudulent entries upon said cash book and ledger, and made it appear by such cash book and ledger that ..... dollars in cash had been paid by plaintiff for said premises, and that said premises had been purchased by said board of directors for plaintiff at the price of ..... dollars of which ..... dollars had been paid in cash, and the balance of which was represented by mortgages; that said false and fraudulent entries were so made by said W.... D.... for the purpose of deceiving the plaintiff and the stockholders of plaintiff, and of concealing from them that said defendants had paid only the sum of ..... dollars in cash for said premises, and of concealing the fact that said defendants were making a secret profit upon the purchase of said premises.

XXVI. That said defendants W.... D.... and H.... M.... falsely represented to said corporation and stockholders thereof, and induced them to believe, and said corporation and said stockholders did believe, that said prem-

ises had been purchased for said corporation at the price of ..... dollars, of which ..... dollars had been paid in cash, and the balance of which was represented by mortgages on said premises.

XXVII. That the amount collected by said W.... D.... and H.... M.... from said subscribers, inclusive of their own subscriptions, in carrying out said fraudulent scheme, was as above set forth, ... dollars; that the amount paid to said W.... & U.... for said premises, was as above set forth, ... dollars; that the amount paid to said W.... Z.... for his interest in said contract or option, was as above set forth, ... dollars; that the total amount paid for said premises by all of said defendants was ..... dollars; that the balance of said ..... dollars, to-wit, ... dollars, has been unlawfully converted by said defendants to their own use, between on or about the .... day of ....., 19.., and the .... day of ....., 19.., as plaintiff is informed and believes, said D.... D.... and D.... M.... receiving as their share thereof ..... dollars, of which ..... dollars was paid out by them as aforesaid, and said W.... D.... and H.... M.... receiving as their share ..... dollars.

XXVIII. That by reason of the premises, said defendants are jointly indebted to plaintiff in the sum of ..... dollars, with interest thereon from the .... day of ....., 19..

WHEREFORE plaintiff demands judgment against said defendants for said sum of ..... dollars, with interest as aforesaid from the .... day of ....., 19.., and costs of this action, and such other and further relief as may be just.

1706. Complaint in equitable action by stockholders on behalf of corporation against fraudulent promoters where corporate officers refuse to sue.

[*Make corporation a party defendant with the promoters, and after alleging its corporate existence, as in the last preceding forms, proceed substantially as follows*]:

That the plaintiffs are all stockholders in said corporation, and that all of them [except A.... B....] agreed to take the stock which they hold before the organization of said corporation, and signed an agreement to that effect, hereinafter set forth. [*After setting forth facts showing the obtaining of*

subscriptions, the organization of the corporation, and the fraud practiced on the corporation, as in the preceding forms, proceed to allege the reasons why the action is not brought by the corporation, as for instance]:

That the plaintiffs first learned the truth in regard to the said sale of land to the corporation, and the fraud practiced by the defendants [*promoters*] about ....., 19.., and that they have in no manner ratified the sale of said land to the corporation after knowledge of the facts of said fraud, nor has said corporation ratified said sale. That this action is brought by the plaintiffs and not by the said corporation because the board of directors thereof is entirely controlled by the said defendants [*promoters*]. That nevertheless the plaintiffs on the .... day of ....., 19.., and before this action, demanded in writing of said board of directors that an action be brought against said promoters to protect the interests of said corporation and its stockholders, and to recover the amount so fraudulently obtained by the said promoters [*or*, to rescind the sale] but that said board of directors refused to bring such action, or any action whatever against said [*promoters*].

[*Demand judgment in favor of the corporation for the amount of fraudulent profits retained by promoters, or if rescission is sought, demand judgment substantially as follows*]:

WHEREFORE the plaintiffs demand judgment on behalf of said corporation, that the aforesaid contract of sale of said land to said corporation be rescinded and set aside, that the said corporation be adjudged to reconvey to said [*promoters*] the said land, and that the said [*promoters*] be adjudged to repay to said corporation the said sum of ..... dollars [*amount of the purchase price*] with interest from ....., 19.., and for such other and further relief as may be just and equitable, with costs.

1707. Complaint in action at law by stockholder to recover his individual damages resulting from the fraud of promoters see Franey v. Warner, 96 Wis. 222; 71 N. W. 81).

[*Set forth the facts of the formation of the corporation, the fraud practiced by the promoters, and the illicit profits received by them, as in the preceding forms, and continue*]:

That this plaintiff first learned the truth in regard to the said sale of land to said corporation, and the fraud practiced by said defendants, on or about the .... day of ....., 19.., that on the .... day of ....., 19.., the plaintiff made written demand upon the directors of said corporation that they bring action against said defendants to rescind said sale or recover the illicit profits so made by said defendants, but that said directors refused and still refuse to bring said action.

That the plaintiff, as a stockholder of said corporation, has suffered damage resulting from the said fraudulent sale of land to said corporation by said defendants, in the sum of ..... dollars.

WHEREFORE plaintiff demands judgment against the defendants for the sum of ..... dollars, with interest from ....., 19.., with costs.

CHAPTER LXXVII.

COMPLAINTS IN ACTIONS FOR PERPETUAL INJUNCTIONS.

1708. To restrain unfair competition in trade by imitation of label or infringement of trademark, and for damages.
1709. To restrain publication of a periodical under a name fraudulently imitating the name of plaintiff's periodical.
1710. By purchaser of physician's good-will, to enjoin his continuing the practice.
1711. To enjoin late partner from continuing business after dissolution.
1712. For injunction and damages upon breach of covenant by purchaser of secret process of manufacture, not to disclose the same.
1713. To restrain negotiation of bill or note, general form.
1714. The same, another form.
1715. Complaint on a note, against maker and indorser, and seeking to reach collateral securities held by indorser.
1716. To obtain interpleader in equity.
1717. To restrain repeated trespass, resulting in multiplicity of suits.
1718. To restrain town officers from opening a highway which has been defectively laid out.
1719. To restrain prosecutions at law for violation of a void city ordinance.
1720. To restrain the erection and maintenance of an unauthorized telephone pole in front of the plaintiff's store.
1721. To compel accounting by corporate officers, and restrain them from appropriating corporate moneys.
1722. By taxpayer to restrain county officers from paying an illegal claim.
1723. By taxpayer to restrain collection of fraudulent judgment against school district.
1724. To restrain sheriff from selling land on execution under a judgment which has been compromised and settled, but never discharged.
1725. Against continuing in business after selling out. (Connecticut Practice Act.)
1726. Complaint for interpleader by life insurance company against two rival claimants of a policy.

1708. To restrain unfair competition in trade by imitation of label or infringement of trademark, and for damages.

I. That the plaintiff is, and for a long time previous to the committing of the grievances hereinafter mentioned, had

been the manufacturer [*or* the vendor] of an article [*describe commodity*] known as ..... which he has for .... years last past offered for sale and sold [in packages, *describing them, if the defendant's packages are similar*], labelled with his own proper device and trademark, adopted by the plaintiff for that purpose in the year 19.., of which the following is a copy [*or* is a specimen: *copy of label, or a specimen of same; or, in a similar manner state other trademark*].

II. That by reason of the long experience and great care of the plaintiff in his said business, and the good quality of said [*commodity*], the same has become widely known in the community as a valuable and useful article, and acquired a high reputation as such, and has commanded and still commands an extensive sale at ..... [*and elsewhere*], which is and has been a source of great profit to this plaintiff.

III. That it is known as such article, to the public and to the buyers and consumers thereof, by the said name of ..... and by the plaintiff's own proper device and trademark aforesaid.

IV. That notwithstanding the long and quiet use and enjoyment by the plaintiff of said name and trademark, the defendant, well knowing the premises, but wilfully disregarding the plaintiff's rights, thereafter and in the year 19.. wrongfully [and fraudulently] prepared and offered for sale, and now does offer for sale and sell, at ..... and elsewhere, an article in imitation of the plaintiff's article, which [with intent to deceive and defraud the public and the buyers and consumers thereof] he has caused to be put up in similar packages, and labelled with a precisely [*or* nearly] similar label, of which false label the following is a copy [*or* specimen: *copy or a specimen of the false label*].

V. That such intention is calculated to deceive the purchasers and consumers of plaintiff's said article, and actually has and still does mislead many of them to buy the article sold by the defendant, in the belief that it is the article manufactured by the plaintiff, greatly to the diminution of the said business and profits of this plaintiff.

VI. That the article so put up and sold by the defendant in imitation of the plaintiff's article is of a greatly inferior quality [*state in what respects*]; and that by reason of the premises the general esteem and reputation of the said article

manufactured by the plaintiff has been injured, greatly to the diminution of the said business and profits of the plaintiff.

[VII. That before this action, and on the .... day of ....., 19.., the plaintiff requested the said defendant to desist from his infringement of the plaintiff's trademark as aforesaid, and to pay to the plaintiff what, upon a just accounting, there would be due him therefor; yet the defend- and refuses so to do.]

VIII. That by reason of the premises the plaintiff has been injured, to his damage ..... dollars.

WHEREFORE the plaintiff demands judgment against the defendant: (1) That the defendant and his servants and agents be forever restrained from preparing, putting up, selling, or offering for sale said imitation of the plaintiff's article, or any article bearing the name of ..... or any imitation of said name, or bearing said false trademark, or any imitation of the label or trademark of the plaintiff. (2) That the defendant account for and pay over to the plaintiff all the profits realized by him upon sales of said [*commodity*], sold by him with any imitation of plaintiff's trademark. (3) For ..... dollars damages. (4) And for the costs of this action.

1709. To restrain publication of a periodical under a name fraudulently imitating the name of plaintiff's periodical.

I. That he is the proprietor and publisher of a newspaper [*or* magazine, *or* almanac, *or other periodical*] at ..... known and distinguished as [*name of the plaintiff's publication*]; and that as such proprietor he has published the same daily [*or*, monthly, *or otherwise*] for .... years last past, and that such publication has been made by the plaintiff, and those through whom he purchased the same, as the owners and proprietors thereof, since the original establishment of the same in the year 19.. under that name.

[*Continue substantially as in preceding form, giving copy of the headings or title-pages, if defendant has imitated the appearance of plaintiff's, and substituting "publication" for "commodity" and "subscribers and readers" for "consumers," etc.*]

1710. By purchaser of physician's good-will, to enjoin his continuing the practice.[1]

I. That in the month of ....., 19.., the defendant being a physician practicing in ..... in the county of ..... and its vicinity, for and in consideration that the plaintiff would purchase of him [his dwelling-house, and lot, and office in that village, and the furniture thereof, and] the good-will of his practice, for the sum of ..... dollars, the defendant agreed with the plaintiff that he would not practice medicine, or in any manner do business as a physician, in said county, at any time after the .... day of ....., 19..

II. That the plaintiff accordingly purchased from the defendant his said ..... for the price and at the terms aforesaid, and paid said sum of ..... dollars, for the good-will of said business.

III. That the plaintiff duly performed all the conditions of said agreement on his part.

IV. That the defendant, in violation of his said agreement, afterwards returned to ..... and commenced, and still continues to practice medicine, and to do business as a physician in said county.

WHEREFORE the plaintiff demands: (1) That the said defendant be enjoined from continuing so to do. (2) For ..... dollars damages. (3) And for the costs of this action.

1711. To enjoin late partner from continuing business after dissolution.

I. That on the .... day of ....., 19.., the plaintiff and defendant being [*or* about to become] partners, carrying on the business of ..... at ..... they both executed under their hands and seals, articles of copartnership for the regulation of their said business; by which, in consideration of the premises, and of the mutual agreement thereto, it was among other things provided that in case of the dissolution of the partnership neither of them should continue business in the building occupied by the firm, nor within one block thereof, for the space of ..... after such dissolution, without the consent of the other.

[1] Sustained against demurrer, in Holbrook v. Waters, 9 How. Pr. 335. See Form 1207 for complaint asking only damages.

II. That on the .... day of ....., 19.., said partnership was dissolved by mutual consent.

III. That the defendant is now, and within ..... after said dissolution, carrying on such business at No. ...., ... Street, in said city, being within one block of the same premises occupied by the late firm, and declares his intention to persist in so doing. That he has put placards on the door announcing his establishment in said business there, and has attempted to advertise the same facts in the public papers; and is employing servants on the premises in the said business.

IV. That the plaintiff has not consented to these proceedings by the defendant, but has objected thereto, and requested him to desist therefrom, which he refuses to do.

V. That the plaintiff has not continued in business on the said premises, nor within one block thereof, but is endeavoring to establish himself in said business at No. .... in ..... Street; but is unable to do so by reason of the defendant's acts aforesaid, and the injury to the plaintiff by the acts complained of cannot be fully compensated in damages.

WHEREFORE the plaintiff demands judgment that the defendant, his agents and servants be restrained by injunction from carrying on, or in any wise engaging in said business in the building known as No. .... in ..... Street, in the said city, or within one block thereof, for the term of ..... from the .... day of ....., 19..; and, also, from advertising or announcing in any manner his location in business there during such term, or putting or keeping up any signs or placards for that purpose, and that the plaintiff recover his costs of this action.

1712. For injunction and damages upon breach of covenant by purchaser of secret process of manufacture, not to disclose the same (sustained against demurrer in Hammer v Barnes, 26 How. Pr. 174).

I. That the plaintiff is by trade a brewer, and teacher of the art of brewing in the city of New York.

II. That by many years of labor and expending large sums of money in experiments, he became possessed of a knowledge of brewing ale by a new and improved process,

which was and is an important secret of his trade, whereby the ale as so manufactured was of a better quality than that manufactured by the old and generally used process, and whereby a great saving of malt was effected; and the keeping qualities of ale so manufactured by plaintiff's process, were better than that manufactured or brewed by the old process. And that said knowledge or discovery was employed and used by this plaintiff in manufacturing, at his brewery in ..... an ale greatly liked and sought after by the public; and the said knowledge or discovery was of great value to him in his said brewing business, and of great value to any one engaged in the brewing business, to whom he should impart it; and the plaintiff made it his principal avocation for several years past to communicate his improved process of brewing to other brewers for a consideration, whereby he acquired great gains, a fact well known to the defendants.

III. That his said improved process is not, as he is advised and believes, the subject of a patent under the patent laws of the United States, it not being of such a nature as required by the law to be patentable; that therefore he never obtained a patent-right on said process, although he did obtain several patents for brewing-utensils; consequently he has no protection against the acts of the defendants except in the preventive remedy of this court.

IV. That, as he is advised and believes, his said process is not a matter which can be readily and specifically set forth in a written description thereof in such full, clear, and exact terms, avoiding unnecessary prolixity, as that the manner and process of making, using, and compounding the same could be readily understood by any person skilled in the art, so that such person thereby would be enabled to make, construct, compound, and use the same.

V. That on or about the .... day of ....., 19.., the said defendants S.... S.... and A.... B...., composing the firm of A.... B.... & Co., and who were engaged in the business of brewing in ..... applied to the plaintiff to communicate said process to them, as they were desirous of adopting the same, for the sole purpose of improving the quality of the ale to be thereafter manufactured by the defendants in their brewery in ..... which process the plaintiff was willing to communicate to them for a moderate sum, which would be considered nominal between the parties

when compared with the value of said improvements, provided the said A.... B.... & Co. would bind themselves not to communicate the same, or any part thereof, either directly or indirectly, to any other person or persons, except the defendant C.... N....; and provided, also, that they, said defendants, would not afford facilities, by neglect, carelessness, or otherwise, so that the said process, or any part thereof, would be discovered by any other person or persons; and provided, further, that the said defendant C.... N.... should make no other use whatever of the said process, or any part thereof, but only for the benefit of the said A.... B.... & Co., by being used in their brewery described; and provided, also, that they, the said defendants, would well and truly keep the covenants and stipulations in the agreement and bond hereinafter set forth, agreed to be preserved and kept, it being a further and tacit stipulation between the parties that the plaintiff might be at liberty to refer to the said A.... B.... & Co., as a reference to substantiate the value of his said improvement.

VI. That thereupon, and on said day, the plaintiff and the said defendants S.... S.... and A.... B...., composing said firm as aforesaid, entered into the agreement, of which the following is a copy [*copy of agreement*].

VII. That in and by said agreement, the said S.... S.... and A.... B.... accepted all and singular the conditions aforesaid; and, as additional security, executed and delivered to this plaintiff their bond, of which the following is a copy [*copy of bond for performance of agreement*]. It being, however, expressly understood by and between the parties, and so stipulated therein, that they, said A.... B.... & Co., should be bound and held unto the plaintiff as well by and under the covenants in the said agreement contained as by and under the penalty and condition of the said bond.

VIII. That the plaintiff, in fulfillment and compliance with the conditions and covenants in said agreement contained to be done and fulfilled on his part, did therefore communicate to said S.... S.... his process of brewing as covenanted by him in said agreement, and gave him all necessary explanation in regard thereto; whereby the firm of A.... B.... & Co. were entitled to, and did, brew by means of said process of the plaintiff, at their said brewery in ..... ale of a far superior quality to that which they were brewing

previously, by the old process, and thereby they saved large quantities of malt; to their great advantage, reputation, and profit, and they still continue to manufacture ale under said process. And the plaintiff further saith, that he in all things duly performed the conditions on his part.

IX. That the said defendants S.... S.... and A.... B...., composing said firm as aforesaid, and the defendant C.... N.... have, in violation of the express covenants and conditions in said agreement contained, made by the said defendants A.... B.... & Co., since the execution and delivery of said agreement, communicated said process, knowledge, and secret of trade given to them as aforesaid by the plaintiff, in the brewing of ale, to divers parties and persons engaged in brewing ales, to-wit [*naming them*] and other persons; and have afforded said several and other persons, by their neglect, carelessness, and otherwise, facilities in discovering said plaintiff's process, and certain parts thereof; so that the said several firms above named, and others, have been enabled, under and by means of such communication and knowledge, and by reason of said carelessness, neglect, and facilities otherwise given, to manufacture, and are still manufacturing, large quantities of ale by using the said improvements of the plaintiff in their brewings, to the great advantage, profit, and reputation of said firms, and to the detriment and damage of the plaintiff; and thereby have enabled the said several persons and firms to bring into market and sell a quantity of ale superior to that brewed by them by the old process, and similar to that of the plaintiff; and thereby have interfered, indirectly and directly, with the ale trade of the plaintiff.

X. That the said defendants have communicated said knowledge and secret of trade in regard to the plaintiff's improved process of brewing ale to said several firms, and to other persons, and each thereof, for and in consideration of certain sums of money paid to and received by the defendants A.... B.... and S.... S.... from said firms and from other persons respectively; and also for and in consideration of certain promises and inducements made and held out to the said A.... B.... and S.... S.... by said several named persons and others, and by each of them.

XI. That although it was definitely and distinctly understood that the said defendants should not, in any way, interfere with his, the plaintiff's rights and business as a teacher

of brewing, yet, in fraud of the rights of the plaintiff, they, the defendants, S.... S.... and A.... B...., as well as the said defendant C.... N...., who has become possessed of said knowledge as manager of A.... B.... & Co., under the said agreement, are ready and willing and offer to instruct and inform any and all the brewers that they may think proper to, in and of the plaintiff's said improved process in the brewing of ale, for sums of money far less than the sum generally charged by the plaintiff for communicating his process, and thus underselling him. That they have held themselves out to the world as ready and willing so to do, and thereby have seriously interfered with the avocation of the plaintiff as a teacher of brewing.

XII. That prior and subsequently to the execution and delivery of said agreement, the said [*persons named in paragraph IX*] were in negotiation with this plaintiff on the subject of the plaintiff's communicating to them his process of brewing. That said negotiations had, as the plaintiff believes, progressed to such a point as that the said several parties would have acceded to this plaintiff's terms in communicating to them, and each of them, his said process; but that while negotiations were pending between this plaintiff and said several parties, the said several parties obtained, and the said defendants secretly, and without plaintiff's consent, and in fraud of his rights, communicated to them the plaintiff's process of brewing ale, in plain violation of the conditions of said bond and of the covenants in said agreement; and said several parties, each and all of them, thereafter declined and refused to purchase said process of the plaintiff; and this plaintiff verily believes that the said several parties and firms would have been willing to have given the sum of ..... dollars, or a large sum of money, each, to the plaintiff for such of his instructions in his said improved process of brewing ale, if the same had not been obtained from the said defendants A.... B.... & Co.

XIII. That the plaintiff, in all the communications which he has made of said process to others, has done it for a valuable consideration, and also under express stipulation to preserve the secret on the part of those to whom it has been communicated, similar in terms and effect to the contract of the said A.... B.... & Co., so that the plaintiff has maintained the value of his said process, until the wrongful acts

of the said defendants, by preserving it from the knowledge of the brewing trade, except where he communicated it for value received. But now, by the wrongful acts of the said defendants, the said secret processes have been disclosed to so many who are not bound by any contract with the plaintiff to refrain from disclosing the same, that its value as a secret is very much diminished, and will be still further diminished unless the said defendants, and each of them is restrained from further imparting said secret to others. That the amount of such injury cannot be estimated in money, nor can it be compensated directly, save by the preventive remedy of this court.

XIV. The plaintiff further shows that he had also, at the time of making said agreement, and down to the time of the violation thereof by the defendants A.... B.... & Co., in addition to his occupation of teaching brewers, a large and profitable interest in a business at ..... in brewing and selling ale. That one great motive and object of the covenants and stipulations on the part of the defendants A.... B.... & Co., in the said agreement and bond contained, was that they, the said A.... B.... & Co. should not impart said improvements to other brewers, who thereby would be enabled to bring into market in ..... aforesaid, and in the other parts of the United States, an ale superior to that brewed by them under the old process, similar in quality to that brewed by the plaintiff; and therefore it was provided in and by said agreement, that the said A.... B.... & Co. should not in any way injure or interfere with the ale trade of the plaintiff, or to offer or to sell, directly or indirectly, ale or any malt liquor to any person or persons who had been furnished by this plaintiff with said ale. That by reason of said acts and doings of the defendants in the premises, the interests in the said trade and business of the plaintiff stands in danger of being greatly injured and reduced in amount, and interfered with by the aforesaid violation of said agreement by the defendants A.... B.... & Co., in this, to-wit: that the said [*persons named in paragraph IX*] and the other persons to whom the defendants have communicated the process, have already injured and interfered with, and will interfere with the plaintiff's said business and trade, and his occupation as a teacher, in offering to sell, and in selling at lower prices and on easier terms than those of the plaintiff, ale

manufactured under plaintiff's said improved process, to his customers, and those he had been in the habit of supplying with said ale, which act and doings the said A.... B.... & Co., under their said agreement, were especially restricted from doing, and which several acts and doings have a tendency to, and will occasion irreparable injury to this plaintiff, which cannot be estimated directly, and is not susceptible of exact proof, but which if allowed to continue pending this litigation, will render ineffectual any judgment the plaintiff may obtain in this action.

XV. And the plaintiff further shows, that the said defendants A.... B.... & Co., and each of them, have not sufficient responsibility to respond to the plaintiff, as he believes, even for the amount of damages provided to be paid in and by the terms of said bond; and he believes that he will be wholly without any pecuniary remedy for any damages sustained by the breach of said covenants, unless they are enjoined by the court.

XVI. That by the aforesaid violation of the said agreement by the defendants S.... S.... and A.... B.... the plaintiff has been directly damaged and injured in a great amount, to-wit, ... dollars, in addition to the said ..... dollars; which last sum he claims due him from them by reason of the breach of the conditions of said bond.

XVII. That for the purpose of the relief by injunction hereinafter prayed for, the plaintiff makes the said C.... N.... a party defendant in this action for that purpose and view only; and the plaintiff avers that the said C.... N.... well knew of the agreement and covenants, and bond aforesaid, and its and their various stipulations at the time of the imparting to him of the process referred to in said agreement, and of the violation thereof by the said defendants; and he well knew that by the said agreements and covenants, the said A.... B.... & Co. bound themselves unto this plaintiff, and made themselves responsible to him, for the acts, omissions, and carelessness of the said C.... N.... in the premises, and that the said C.... N.... as agent and manager of the brewery of A.... B.... & Co. participated with the other said defendants in the said violation.

WHEREFORE the plaintiff prays judgment: (1) Against the said defendants S.... S.... and A.... B.... for the amount of liquidated damages provided to be paid in

and by the said bond, to-wit, the sum of ..... dollars. (2) The further and additional sum of ..... dollars as additional damages sustained by him by reason of the violation of said agreement by them, over and above the damages in said bond provided for. (3) That the said defendants S.... S...., A.... B.... and C.... N.... be forever enjoined and restrained from communicating in any manner, either directly or indirectly, now or at any time hereafter, to any person or persons, any knowledge or information in relation to or concerning the plaintiff's said improved process of brewing ale, which was imparted to said S.... S.... under said agreement of ....., 19.., by the plaintiff, so that the said process of brewing, or any part thereof, shall be discovered by any person or persons whomsoever. And, also, in the mean time, until said judgment enjoining and restraining the said defendants, and each of them, from the acts aforesaid, until the further order of this court. (4) That the said defendants A.... B.... and S.... S.... in addition to paying him the liquidated damages provided to be paid to him in and by said agreement, may also be adjudged and decreed to pay to him, the plaintiff, such additional damages as he may have sustained by reason of such other breaches of the covenants in this action as may not be included in said breach, calling for said ..... dollars. (5) That the said two named defendants, and each of them, may be adjudged and decreed to be the trustees of this plaintiff, for the moneys received by them from said several parties, and from others, for said instructions, and to account to him, the plaintiff, therefor; and until such accounting, that he, this plaintiff, may have an order for injunction and receiver in this action. (6) And he further prays for such other and further relief in the premises against the two defendants A.... B.... and S.... S.... as may be just, and that he may have judgment thereon, with costs of suit.

1713. To restrain negotiation of bill or note, general form.

[*Allege making of note for specified object, and its failure, e. g., as in Form 1250.*]

II. That the defendant still retains the said note in his possession; and though, on the .... day of ....., 19.., the

plaintiff requested him to deliver it up, he refused so to do.

WHEREFORE the plaintiff demands judgment: (1) That the defendant be enjoined from negotiating, transferring, or enforcing the same. (2) That it be delivered up and cancelled. (3) And for the costs of this action.

1714. The same, another form.

I. That on the .... day of ....., 19.., he made and delivered to the defendant a promissory note in the words and figures following [*insert copy of note*].

II. That the said note was given as the purchase price of a pretended patent right for an article designated as [*name article*], and that said defendant represented to plaintiff that he had a valid patent right for said article, when in fact said patent then was and now is void and of no value whatever; but that plaintiff, relying upon said representations of defendant, was induced to make and deliver to him said note, in payment for the said patent right, and has received no consideration of any kind therefor.

III. Upon information and belief, that said defendant still holds said note, and is about to transfer said note to an innocent purchaser for value, in order to prevent the plaintiff from making a defense to the same.

IV. The plaintiff now offers to return and reconvey said pretended patent right to defendant.

WHEREFORE, etc.

1715. Complaint on a note, against maker and indorser, and seeking to reach collateral securities held by indorser (from report of the New York Commissioners of the Code, p. 123).

I. That on the .... day of ....., 19.., at ..... the defendant [*maker*] for the purpose of inducing the plaintiff to sell him certain goods, agreed to give him, in payment therefor, the said defendant's promissory note, indorsed by the defendant [*indorser*] and represented to the plaintiff that the said [*indorser*] would be adequately indemnified, by collateral security for his indorsement.

II. That the plaintiff was thereby induced to sell and deliver to the said [*maker*] certain goods, of the value of ..... dollars.

III. That on the .... day of ....., 19.., at ..... in consideration thereof, the said [*maker*] by his promissory note, promised to pay to the order of the said [*indorser*] ..... dollars .... months [*or* days] after said date.

IV. That the said [*indorser*] indorsed the same to the plaintiff.

V. That on the .... day of ....., 19.., the same was presented to the said [*maker*] for payment, but was not paid.

VI. That due notice thereof was given to said [*indorser*].

VII. That the same has not yet been paid.

VIII. That the said [*maker*] when he procured the said indorsement from the said [*indorser*] lodged with him six promissory notes, for the aggregate sum of ..... dollars, made by one M.... N.... and indorsed by the said defendant [*maker*] as security for such indorsement.

IX. That the said defendant [*maker*] is endeavoring to withdraw the said notes from the said [*indorser*] to prevent their application in payment of the demand of the plaintiff on the said indorsement.

X. That the plaintiff has requested the said [*indorser*] to apply the said notes to the payment of the plaintiff's said claim, but he refuses to do so.

WHEREFORE the plaintiff demands judgment: (1) For ..... dollars, with interest from the .... day of ....., 19.. (2) That the notes placed in the hands of the said [*indorser*] as security, be applied to the payment of the said sum. (3) That the defendants be restrained by injunction from disposing of the said notes to any person other than the plaintiff.

1716. To obtain interpleader in equity.[2]

I. That before the making of the claim hereafter mentioned one M.... N.... deposited with the plaintiff [*describe the property*] for [*safe-keeping*].

[2] The ancient action of interpleader still exists but is not encouraged and is only to be brought in cases where the plaintiff can not otherwise exonerate himself from liability. McDonald v. Allen, 27 Wis. 108; Hinckley v. Pfester, 83 Wis. 64; 53 N. W. 21. The provisions of most of the codes, which allow one who is sued to bring the fund into court nd cause the rival claimant to be interpleaded, generally take the place of the action of interpleader.

II. That the defendant W.... X.... claims the same [under an alleged assignment thereof to him from the said M.... N....]

III. That the defendant Y.... Z.... also claims the same [under an order of the said M.... N.... transferring the same to him].

IV. That the plaintiff is ignorant of the respective rights of the defendants.

V. That he has no claim upon the said property, and is ready and willing to deliver it to such persons as the court shall direct.

VI. That this action is not brought by collusion with either of the defendants.

WHEREFORE the plaintiff demands judgment: (1) That the defendants be restrained, by injunction, from taking any proceedings against the plaintiff in relation thereto. (2) That they be required to interplead together concerning their claims to the said property. (3) [That some person be authorized to receive the said property pending such litigation.] (4) That upon delivering the same to such [person] the plaintiff be discharged from all liability to either of the defendants in relation thereto. (5) And that the plaintiff's costs be paid out of the same.

1717. To restrain repeated trespass, resulting in multiplicity of suits (adapted from complaint sustained in Miller v. Hoeschler, 121 Wis. 558; 99 N. W. 228).

I. That at and for many years prior to the times hereinafter stated, the plaintiff was and still is the owner and in possession of the following described parcel of land [*describe same*], and has maintained, and still does maintain a dwelling-house upon the said lands, standing within .... feet of the west boundary line thereof.

II. That some time in the month of ....., 19.., the defendant, without the consent of the plaintiff, forcibly entered upon the said parcel of land, and constructed a fence along the entire east side of said parcel and within two feet of the plaintiff's said dwelling house, and thereby cut off from the plaintiff's said premises a strip of land .... feet in width, comprising a part of his door-yard, and also cut off the plain-

tiff from egress from his said premises to ..... Street, a public highway in said city, and entirely excluded the plaintiff from the use of said strip of land; that the plaintiff, immediately removed the said fence so constructed by the defendant [*if the defendant reconstructed the fence and committed further trespasses, set them forth*].

III. That the said defendant threatens and asserts that he will reconstruct said fence at the place aforesaid as often as the plaintiff removes the same, and will construct a building partially upon the said strip of land, and thus permanently deprive the plaintiff of the use and enjoyment thereof, and the plaintiff fears that the said defendant will carry out his said threats unless restrained by the judgment of this court, and that if the defendant does continue said trespass he will put the plaintiff to irreparable injury, and will harass, vex and annoy the plaintiff, and will put him to the necessity of bringing a multiplicity of actions to protect his rights.

WHEREFORE plaintiff demands judgment that the said defendant, his agents and attorneys, and all persons claiming by or under him subsequent to the filing of a notice of the pendency of this action, be perpetually enjoined, and restrained from taking possession of or attempting to take possession of the said strip of land, and from placing any obstruction thereon, or in any manner interfering with the use and occupation thereof by the plaintiff; and that the plaintiff have such other and further relief as may be equitable, together with the costs of this action.

1718. To restrain town officers from opening a highway which has been defectively laid out (adapted from the complaint sustained in Ruhland v. Jones, 55 Wis. 673; 13 N. W. 689).

I. That on and prior to the .... day of ....., 19.., the plaintiff was and still is the owner and in possession of the following described land [*describe the land*].

II. That on the .... day of ....., 19.., a petition was presented to the supervisors of the said town of ....., signed by more than six freeholders of the said town, praying that a highway be laid out as follows [*describe the proposed highway*], which said proposed highway would, if laid out, run through and across the said land of the plaintiff, as well

as several parcels of land in said town owned and possessed by C.... D...., E.... F.... and G.... H...., described as [*describe each parcel, giving the ownership thereof.*]

III. That upon the filing of said petition, the supervisors of said town caused notice to be given that they would meet on the .... day of ....., 19.., at ..... o'clock in the .... noon, at ..... to decide upon said location; that at the time and place so fixed the said supervisors met, and adjourned the said meeting to [*give date and place*], and gave due notice of such adjournment; that at the time and place last mentioned the supervisors again met, and adjourned said meeting to the .... day of ....., 19.., and gave notice of such adjournment, but designated no place where said adjourned meeting would be held; that upon the said last named date said supervisors met pursuant to said adjournment, and not otherwise, and attempted to decide upon said petition, and made and signed an order purporting to lay out said highway in accordance with said petition, in which said order said highway was described as follows [*give description*].

IV. That said highway, as by said order laid out, runs over and through the said lands of the plaintiff, and the said lands of the said C.... D...., E.... F.... and G.... H....; that neither the said plaintiff, nor the said C.... D...., E.... F.... and G.... H.... consented to the making of the said order laying out the said highway, nor made any agreement with the said supervisors concerning the damages by them sustained by reason of the laying out of said highway, nor did either the plaintiff nor the said C.... D...., E.... F.... and G.... H.... realize the said damages. That the said supervisors, by an order made on the .... day of ....., 19.., pretended to assess the damages resulting from the laying out of said highway, and awarded as such damages to the plaintiff the sum of ..... dollars, but that the said supervisors did not estimate the damages sustained by the said C.... D...., E.... F.... and G.... H...., or either of them, nor award to them any damages from the laying out of said highway.

V. That on the .... day of ....., 19.., the said supervisors gave notice in writing to the plaintiff, requiring him to remove the fences upon his said lands within the bounds of said proposed highway, as aforesaid, and that it is the inten-

tion of said supervisors, if the plaintiff does not remove his said fences on or before the .... day of ....., 19.., to cause the same to be removed and to open said highway, and the said supervisors assert that they will cause the said highway to be opened and the said fences to be removed in case the plaintiff does not remove the same in accordance with said order.

VI. That by reason of the fact that the said supervisors adjourned their said first meeting for more than thirty days before deciding upon such application they lost jurisdiction of said proceeding, and their said order of ....., 19.., is for that reason wholly void; that said last named order is also void by reason of the fact that said supervisors assessed and awarded no damages to the said C.... D...., E.... F.... and G.... H.... for the laying of said highway upon their lands, as aforesaid; that by reason of the said facts said supervisors have no legal right to cause a removal of the plaintiff's said fences, but that unless restrained by this court said supervisors will remove the said fences and open said highway, to the great and irreparable injury of the plaintiff.

WHEREFORE the plaintiff demands judgment that the said order laying out said pretended highway be declared void, and that the said supervisors, and their successors in office, be perpetually enjoined from removing the plaintiff's said fences within the limits of said proposed highway, or any part of such fences, and from opening the said highway; and for such other relief as may be equitable, with the costs of this action.

1719. To restrain prosecutions at law for violation of a void city ordinance (adapted from complaint in Schlitz Brewing Co. v. Superior, 117 Wis. 297; 93 N. W. 1120).

I. That at the times hereinafter mentioned the plaintiff was and still is a corporation organized under the laws of the state of ....., and that the defendant, the city of ..... is a municipal corporation organized under the laws of said state, and that the defendants C.... D.... and E.... F.... are respectively the mayor and city clerk of the said city of .....

II. That the plaintiff has been for many years, and now is, engaged in the manufacture and sale of malt liquors having its principal office in the city of ..... in said state, where it has a large and extensive manufactory, and that for more than one year last past it has established and maintained in said city a warehouse for the storing of the products of its manufactory, and used by it in the conduct of its business in said city of ..... of the value of ..... dollars.

III. That in the usual and ordinary course of its business the plaintiff has shipped, at frequent intervals, from its manufactory in ..... to the said city of ..... a part of the product of its said manufactory in barrels, kegs, and bottles, and has kept the same in its said warehouse in ..... until delivered to its customers in the said last named city, but that the plaintiff has not sold, nor does it now sell or offer for sale, at said last named city, any of said product in quantities less than one gallon, or in any other quantity to be drunk in or about said warehouse; that the business of the said plaintiff at said last named city consists simply and only in maintaining said product in said store-house, and delivering therefrom in original packages, to its customers in said last named city, the said product of its manufactory, and that said warehouse is used, and has been used simply as a place of storage for the said product, and for no different purpose. That the said plaintiff employs an agent at said last named city to take orders for its said product, and to deliver the same to various parts of the said city and elsewhere, and that the taking of such orders and the delivery of said product are not confined to said warehouse, but extend to other and various parts of said city, and to other and various buildings therein, and that such business has been heretofore carried on without regulation or supervision by said city, and without necessity therefor.

IV. That on or about the .... day of ....., 19.., the said city adopted an ordinance, which was thereafter published according to law and went into force and effect, wherein it was provided among other things, as follows [*set forth ordinance, as adopted,—in the case in question the ordinance provided for the obtaining of a license and giving of a bond by dealers in malt liquors*].

V. That the said ordinance is invalid and void, for the following reasons [*here set out the reasons for the invalidity of*

the ordinance,—in the case from which the present form is adapted the reasons alleged were that the common council had no power under its charter to pass such an ordinance, that the same was discriminating and in restraint of trade].

VI. That said defendant, city of ..... and the other defendants, as its officers, have given out and threatened that they will enforce the provisions of said ordinance, and will file complaints and institute actions against the plaintiff, for the purpose of recovering the fines and penalties mentioned therein for the violation thereof, and will continue, from time to time, to file such complaints and institute such suits, and thereby create and carry on a multiplicity of suits against the plaintiff, and compel the plaintiff to pay out a large amount of money in fines and penalties, and will cause the frequent arrest of the plaintiff's officers and agents, and that the plaintiff fears that unless restrained by the judgment of this court, the said defendants will carry out their said threats, and the business of the plaintiff will be utterly destroyed in said city, and irreparable injury will be done to the plaintiff, and the plaintiff will be subjected to a multiplicity of suits, as aforesaid.

WHEREFORE the plaintiff prays that the said ordinance be declared null and void, and that said defendants be enjoined and restrained from enforcing or attempting to enforce said ordinance by the judgment of this court; and for such other relief as may be just and equitable, with costs.

1720. To restrain the erection and maintenance of an unauthorized telephone pole in front of the plaintiff's store (adapted from complaint in Krueger v. Wisconsin Tel. Co., 106 Wis. 96; 81 N. W. 1041).

I. [*Allege corporate existence of the corporation, as in Form 848.*]

II. That at the times hereinafter mentioned the plaintiff was, and still is, the owner and in possession of the following described real estate [*describe same*], and that the plaintiff's title extends to the center of ..... Street in said city of ....., which street bounds said property on the south, and to the center of ..... Street in said city, which bounds said property on the east.

III. That there is now, and has been for several years last past, a large and valuable building on the said real estate, which said building is the property of the said plaintiff, and has been and is used for a drug store and abuts upon the said streets, the front of which store is constructed of glass door and windows for the purpose of furnishing light, and that any obstruction in front of said windows materially and injuriously interferes with the use and enjoyment of said property, and depreciates its value, which said depreciation is constant and continuing, and cannot be adequately compensated in damages.

IV. That on or about the .... day of ....., 19.., the defendant unlawfully and against the will of the plaintiff, entered upon and took possession of a strip of land along the easterly and southerly side of said building, and upon the said lands of the plaintiff, and unlawfully excavated earth therefrom, and set in and upon the said lands a large and unsightly pole, and placed wires and cables and other material thereon, along and across the said lands of the plaintiff, which said pole and wires and cables thereon materially encumbers the said property and obstructs the view from the south side of said store, and interfers with the use and enjoyment of said property.

V. That said defendant declares its intention and purpose to keep and hold possession of the said land, and maintain the said pole, wires and cables thereon, without paying compensation therefor to the plaintiff, and without leave or license from the said city of ....., and that if the defendant is allowed so to hold possession of said land, and maintain said pole, wires and cables, they will inflict great injury upon the plaintiff's said property, which injury will be irreparable.

WHEREFORE the plaintiff demands judgment for the sum of ..... dollars, his damages already sustained, and that the defendant be required to remove the said pole, wires and cables from the plaintiff's said land, and be forever enjoined and restrained from maintaining the same upon said lands, and for such other and further relief as shall be equitable, together with the costs of this action.

1721. To compel accounting by corporate officers, and restrain them from appropriating corporate moneys (adapted from complaint in Consolidated Vinegar Works v. Brew, 112 Wis. 610; 88 N. W. 603).

I. [*Allege incorporation of the plaintiff, as in Form 848.*]

II. That on the .... day of ....., 19.., the defendant was duly elected secretary and treasurer of said corporation, and still is such officer, and that his duties, among other things, are to keep true books of account of the business of said corporation, and receive, receipt for, and properly disburse all corporate moneys, and render accounts therefor when required by the plaintiff or board of directors of said corporation.

III. That the assets of said corporation consists of manufactured product, of fixtures used in the manufacture of said product, and of outstanding accounts which the defendant has been and is collecting, and that the liabilities of said corporation consists of outstanding notes and claims for merchandise, amounting in all to the sum of ..... dollars, and that the assets of the plaintiff if collected and paid in are sufficient to pay all of said liabilities.

IV. That since the .... day of ....., 19.., the said defendant, as treasurer aforesaid, has collected upon the accounts due said corporation, the sum of ..... dollars, and has appropriated the same to his own use, and that the defendant still has in his possession and under his control, as such officer, outstanding accounts belonging to the said plaintiff, amounting to about the sum of ..... dollars.

V. That on the .... day of ....., 19.., the plaintiff's president demanded of said defendant that he account for the said sum so collected by him, and that the defendant refused to render any account of said moneys, and still refuses to render such account.

VI. That the creditors of said plaintiff are pressing their claims, and that unless the money belonging to the plaintiff, and in the hands of the defendant, is accounted for and paid over by him, the plaintiff fears that its property will be levied upon and sold, and its business greatly injured.

WHEREFORE the plaintiff demands judgment that an accounting be had of the moneys collected by the said de-

endant belonging to the plaintiff, and that the said defendant be enjoined from appropriating to his own use any of the moneys so collected, and required to pay said moneys into the treasury of the plaintiff, and that he be further enjoined from collecting any further moneys due to the plaintiff; and that the plaintiff have such other and further relief as may be equitable, and for the costs of this action.

1722. By taxpayer to restrain county officers from paying an illegal claim (adapted from complaint in Quayle v. Bayfield Co., 114 Wis. 108; 89 N. W. 892).

I. That at the times hereinafter mentioned the plaintiff was and still is a taxpayer and resident of the county of ....., and brings this action as such taxpayer on behalf of himself and all other taxpayers of the said county.

II. That at the times hereinafter mentioned the said defendant C.... D.... was and still is the duly elected and acting county clerk of the said county of ....., and said defendant E.... F.... was and still is the duly elected and acting treasurer of the said county of .....

III. That on the .... day of ....., 19.., the board of supervisors of said ..... county, without authority pretended to pass a certain resolution authorizing the defendant C.... D...., as county clerk of said county, to draw an order upon the defendant E.... F...., as county treasurer of said county, payable to the defendant G.... H...., for the sum of ..... dollars, and to deliver the same to said G.... H.... upon his filing with said clerk a satisfaction or receipt for said claim.

IV. That the said board of supervisors had no authority whatever to pass said resolution; that said claim is not a valid claim against said county, for the reason that the same identical claim was presented to the board of supervisors of said county more than one year prior to the said .... day of ....., 19.. [*date of the allowance*] and was then disallowed in full, whereupon said G.... H.... appealed to the circuit court of said ..... county from such disallowance, and the said action was brought on for trial before the said court and a jury, at the regular .... term of said court, and a verdict was rendered for the defendant ..... county,

upon which verdict, on the .... day of ....., 19.., judgment was rendered in favor of said county and against said G.... H...., adjudging said claim to be illegal and void which judgment still remains in full force and effect.

V. Upon information and belief, that the said G.... H...., and a majority of the members of said board of supervisors have conspired together by unfair and unjust means to secure the payment of said illegal and void claim, and that the action of the said board of supervisors in authorizing the payment thereof as aforesaid, is the result of the said unlawful conspiracy.

VI. That if the said claim is paid, it will necessarily increase the taxes of this plaintiff, and all other taxpayers of said county, and thereby injuriously deprive the plaintiff and said taxpayers of their money, and that the plaintiff has no adequate remedy at law.

VII. That the defendant C.... D...., as clerk aforesaid, threatens to issue said order, and the defendant E.... F.... threatens to pay the same out of the moneys of said ..... county, and that the plaintiff fears that unless enjoined by the judgment of this court the said order will be issued and paid, and the plaintiff and the other taxpayers of said county will be without remedy.

WHEREFORE the plaintiff demands judgment that the said resolution of the said board of supervisors be declared illegal and void, and be cancelled, and that the defendants, and each of them be enjoined and restrained from issuing, receiving, or in any manner paying said order; and for such other and further relief as may be equitable, with the costs of this action.

1723. By taxpayer to restrain collection of fraudulent judgment against school district (adapted from Balch v. Beach, 119 Wis. 77; 95 N. W. 132).[3]

I. That the defendant school district No. .... of the town of ..... is a duly organized school district of the town of ....., in said county of ....., state of .....

[3]An equitable action cannot be maintained in Wisconsin to set aside a judgment. This relief is to be obtained under th code practice by motion. Wis. Stats. 1913 sec. 2879, 2832. Equity will, however, prevent the enforcement of a judgment obtained by fraud,

II. That the plaintiff is a resident, voter, and taxpayer of said school district, and that the defendant C.... D.... is the town clerk of the said town of ....., and that said C.... D.... is about to levy a tax for the payment of the judgment hereinafter mentioned, and that this plaintiff brings this action as such resident and taxpayer, in his own behalf, and on behalf of all other residents and taxpayers of such school district.

III. That the defendant C.... D.... is the duly elected and qualified and acting town clerk of said town of ....., and is also the plaintiff in the judgment hereinafter set forth, and claims to be the owner thereof.

IV. That at the times hereinafter mentioned, the assessed valuation of all taxable property within the said district did not exceed the sum of ..... dollars, and that at a special school district meeting, held in and for said district on the .... day of ....., 19.., a resolution was duly passed authorizing the school board of said district to borrow the sum of ..... dollars for the purpose of building a school-house in said district, which said resolution was in words and figures, as follows [*copy of resolution*]:

V. That thereafter, and pursuant to said resolution, said sum of ..... dollars was borrowed by said district, and said sum is still owing by said district, and that other sums have been provided by said district for the purpose of building said school-house.

VI. That thereafter the defendant C.... D.... was appointed one of the building committee to superintend the building of the school-house for said district, with said fund. That notwithstanding and only the said sum of ..... dollars was provided by said district for the purpose of building said school-house, the defendant C.... D...., together with the persons assuming to act as the school board of said district, without authority or legal right, undertook to build and construct a school-house for said district costing more

and will also prevent the inequitable use of a judgment. Crowns v. Forest Land Co., 102 Wis. 96; 78 N. W. 433. See also Balch v. Beach, *supra;* and Johnson v. Huber, 106 Wis. 282; 82 N. W. 137. In Minnesota an action may be maintained to set aside any judgment obtained by perjury or fraud if brought in the same judicial district within three years after the discovery of the fraud. Minn. Gen. Stats. 1913 sec. 7910.

than the sum of ..... dollars, and to make the said expense so incurred a charge and indebtedness against said school district.

VII. That the said defendant C.... D...., and the said persons pretending to act as the school board of said district, in pursuance of said illegal purpose, and prior to the .... day of ....., 19.., incurred and contracted indebtedness in the name of said school district to an amount exceeding the sum of ..... dollars, and in excess of the limit of indebtedness which said district was by law authorized to incur, and that the said defendant C.... D...., as such building committee, undertook to employ and did employ various persons to perform work and labor upon said school-house, and attempted to make the claims for such services a charge against the said district, notwithstanding the legal limit of indebtedness which said school district was authorized to incur had been reached, and notwithstanding that all funds which had been provided by said district for the building of said school-house had been expended.

VIII. That thereafter the defendant C.... D.... for the purpose of procuring payment from said district of said illegal claims and demands, procured without consideration an assignment to himself of a large number of said pretended claims against said school district, and thereafter wrongfully and fraudulently colluded with the director and clerk of said school district and commenced an action in the ..... court of ..... county against the said school district upon the said claims, in his own name, and caused the summons and complaint in said action to be served upon said director and clerk upon the .... day of ....., 19.., a copy of which complaint is hereunto annexed, marked Exhibit A.

IX. That the said director and clerk of said school district colluded with the plaintiff C.... D.... and concealed all knowledge of the bringing of said action from the plaintiff, and other taxpayers, as well as from the other officers of said district, and fraudulently failed and neglected to interpose any defense to said action, although he well knew that said claims and demands were illegal and void against said district. That said complaint was not filed until after the obtaining of judgment in said action, and that on the .... day of ....., 19.., said plaintiff procured judgment upon default in said action upon said demands, with the conniv-

ance and consent of the said director and clerk aforesaid, and caused said judgment to be served upon himself as town clerk of the town of ..... and the said defendant C.... D...., as such town clerk now threatens to levy, and is proceeding to levy the sum of ..... dollars on the taxable property of said school district for the purpose of paying the said fraudulent judgment, and to insert the said sum in the tax-roll of said town, and cause the same to be collected as other taxes are collected.

X. That after the discovery of the entry of said judgment, as aforesaid, the plaintiff demanded of the director and clerk of said school district that an action be begun in the name of said district to set aside said judgment and restrain the collection thereof, but that said clerk and director refused, and still refuse to bring said action, and that the plaintiff and all other citizens and taxpayers of said district are without remedy against said illegal claim and judgment, except in an action in equity.

XI. That the said defendant C.... D.... will, unless restrained by the order and judgment of this court, proceed to levy and collect the said illegal judgment.

WHEREFORE the plaintiff demands that the defendant be enjoined and restrained from levying or attempting to levy the amount of said judgment, or any part thereof, against the taxable property of said school district, and that the plaintiff have such other and further relief as may be equitable, together with the costs of this action.

1724. To restrain sheriff from selling land on execution under a judgment which has been compromised and settled, but never discharged (precedent sustained in Johnson v. Huber, 106 Wis. 282; 82 N. W. 137).

I. That the defendant E.... F.... was for two years immediately preceding the first Monday of January, 1899, sheriff of said county, duly qualified and acting as such.

II. That prior to the .... day of ....., 19.., an action was pending in said court, wherein the said defendant C.... D.... was plaintiff, and this plaintiff was defendant. That on said .... day of ....., 19.., such proceedings were had in said action last named that a judgment was duly rendered

therein in favor of said defendant C.... D.... plaintiff in said last named action and against this plaintiff A.... B.... defendant therein, for the sum of ..... dollars damages and ..... dollars costs and disbursements therein, which judgment was duly entered and docketed in the office of the clerk of said court on said last named day.

III. That soon after the rendition of said judgment, to-wit, prior to the first day of February, 19.., the said plaintiff, defendant in said last named action, appealed from said judgment against him to the supreme court of the state of ..... and duly perfected said appeal in said supreme court. That this plaintiff was also about to commence an action against C.... D.... for alleged slanderous words spoken by said C.... D.... of this plaintiff. That some time in the month of ..... or ....., 19.., the said C.... D.... and this plaintiff, through the interposition of friends, agreed that said appeal should be dismissed and that all matters of difference between them should be settled, cancelled and adjusted, and that they would meet together and agree upon the terms of said settlement. That thereupon said appeal was, in consideration of said agreement, duly dismissed and this plaintiff abandoned the prosecution of the action he was about to commence against said C.... D...., defendant therein. That on the .... day of ....., 19.., in pursuance of said agreement, and to carry the same into effect, the said C.... D.... and this plaintiff met and this plaintiff then and there agreed to and did pay to the said C.... D.... the plaintiff in said last named action, and defendant herein, the sum of ..... dollars, which said C.... D.... then and there agreed to receive in full satisfaction and discharge of said judgment and of all claims whatsoever. That by the terms of said agreement ..... dollars thereof was then and there paid to said C.... D.... by this plaintiff and ..... dollars was by this plaintiff paid to and received by him, the said C.... D.... in pursuance of the said agreement within .... days from the said .... day of ....., 19..

IV. That on or about the .... day of ....., 19.., the said C.... D...., by his attorney, L.... M...., in violation of said agreement, wrongfully caused to be issued out of said court an execution upon said judgment against this plaintiff and in favor of him, said C.... D.... for the amount that appeared of record to be due thereon, to-wit, the

said sum of ..... dollars, said execution being under the seal of said court and in due form as prescribed by statute; that said L.... M.... delivered said execution to the said defendant E.... F...., then the sheriff of said county as hereinbefore alleged. That said sheriff now holds said execution and gives out and threatens that he will, by virtue thereof, levy upon and seize the property of this plaintiff, defendant in said execution, to satisfy the same.

V. That plaintiff is the owner in fee simple and in possession of the following described land, together with numerous other tracts of land, situated in the county of ..... and state of ....., to-wit [*describe the land*] and that said defendant C.... D.... claims a lien upon said land by virtue of said judgment, and that said judgment is an apparent lien upon said land and a cloud upon plaintiff's title thereto.

WHEREFORE plaintiff demands the judgment of this court, that said judgment so as aforesaid rendered and docketed in said county in favor of said C.... D.... and against this plaintiff be satisfied and cancelled of record; that said E.... F.... be perpetually restrained and enjoined from making any levy upon or seizure of the property of this plaintiff by virtue of said execution and from taking any action whatever under and pursuant to said execution, except to return the same in pursuance of the order and judgment of the court, and that in the meantime and pending this action and until further order herein, said defendant C.... D.... and said sheriff, their attorneys, agents, deputies, and all persons in any way acting for or representing them, or either of them, be restrained and enjoined from levying said execution upon the property of this plaintiff and from taking any action whatever to enforce said judgment and that the plaintiff may have such other or further order, or judgment as the court shall deem just and equitable.

1725. Against continuing in business after selling out (Conn. Pr. Act, Form 137).

I. That on ....., 19.., defendant, being a physician practicing in the city of ....., and its vicinity, in consideration that plaintiff, who was also a physician, would purchase of him the good-will of his practice, for ..... dollars, agreed with plaintiff that he would not practice medicine, or

in any manner do business as a physician in said city or the vicinity thereof, at any time after said day.

II. That plaintiff accordingly, on said day, purchased from defendant the good-will of his said practice, for the price and on the terms aforesaid, and paid to defendant said sum therefor.

III. That plaintiff thereupon opened and has since maintained an office in said city as a practicing physician.

IV. That defendant, in violation of his said agreement, on ....., 19.., opened an office in said city, and commenced and still continues to practice medicine, and do business as a physician in said city and the vicinity.

V. That by reason thereof plaintiff has been damaged ..... dollars.

WHEREFORE plaintiff demands judgment permanently enjoining defendant from continuing said practice, and for ..... dollars damages, with costs.

1726. Complaint for interpleader by life insurance company against two real claimants of a policy.

I. [*Allege plaintiff's corporate character and business.*]

II. [*Allege issuance of policy and give its terms.*]

III. [*Set forth the facts, so far as known, giving rise to the rival claims, as for instance an assignment by the insured, or other alleged facts on which the rival claims are based, and show that both parties threaten to sue the plaintiff.*]

IV. [*Allege that plaintiff is not colluding with either of the defendants concerning the matters in question, and does not bring the action at the solicitation of either of the defendants but solely of its own motion, in order to avoid the annoyance, costs and expense of double litigation.*]

V. That plaintiff is ignorant of the respective rights of the said defendants, and cannot determine, without hazard to itself, to which of the said defendants the moneys due upon and under the said policy of insurance of right belong; that it is in doubt as to which of the said defendants is right in his claim, and has no means of satisfactorily ascertaining what are the facts of the several transactions which are relied upon by said defendants as the foundation of their respective claims; and this defendant cannot pay over the moneys due upon the said policy of insurance, to any or

either of the said defendants, without taking upon itself the responsibility of determining doubtful questions of law and of fact, and without incurring the risk of being subjected to great cost and expense in defending itself and to a double payment of the same indebtedness, if it should finally appear that the plaintiff had wrongfully determined in favor of any one claimant at the expense of the others, and without being involved in a multiplicity of suits.

VI. Plaintiff admits that the sum of ..... dollars, with interest from the .... day of ....., 19.., is due upon and under the said policy of insurance, and offers, and is ready and willing, to bring the money due upon the said policy of insurance, to-wit, the sum of ..... dollars, together with said interest, into court, to abide the judgment to be made and entered herein.

WHEREFORE, etc. [*Prayer for judgment to the effect that plaintiff be allowed to bring the money into court, that the parties be enjoined from prosecuting actions against the plaintiff, and that they be required to make their claims to the fund and that plaintiff be discharged from liability, etc.*]

CHAPTER LXXVIII.

COMPLAINTS IN ACTIONS FOR DIVORCE AND ANNULMENT OF MARRIAGE.

1727. Complaint for divorce on the ground of adultery.
1728. Complaint for limited divorce on account of cruel and inhuman treatment.
1729. Allegation of wilful desertion.
1730. Allegation of habitual drunkenness.
1731. Allegation of voluntary separation for five years.
1732. Allegation of failure to support, by wife.
1733. Allegation of conduct by husband rendering it unsafe for wife to live with him.
1734. Allegation of impotency, or physical incapacity.
1735. For annulment of marriage on account of nonage.
1736. For annulment on the ground of lunacy.
1737. For annulment on the ground of fraud by husband.
1738. The same, on the ground of fraud by wife.
1739. For annulment, on account of defendant's prior marriage, plaintiff acting in good faith. (Nebraska).
1740. Complaint to affirm validity of marriage.

The divorce statutes of the various states, while quite similar in general features, differ considerably in detail. The greater part of the forms in this chapter, while primarily adapted to use in Wisconsin, may with proper alteration be adapted for use in the other states. Careful attention should be paid to the statutory requirements in each case, as such actions are entirely regulated by the statute. The statutes governing divorce in the various states are cited in the note [1].

1727. Complaint for divorce on the ground of adultery.

I. That on the .... day of ....., 19.., at ..... state of ..... the plaintiff and defendant were married, and ever since have been and now are husband and wife.

[1] Wis. Stats. 1913 sec. 2348 *et seq.*; Ariz. R. S. 1913 sec. 3858 *et seq.*; Ark. Dig. of Stats. 1904 sec. 2672 *et seq.*; Cal. C. C. 1906 sec. 90 *et seq.*; Colo. Stats. Ann. 1911 sec. 2112 *et seq.*; Idaho Rev. Codes 1908 sec. 2645 *et seq.*; Iowa Ann. Code 1897 sec. 3171 *et seq.*; Kans. Gen. Stats. 1909 sec. 6258 *et seq.*; Mont. Rev. Codes 1907 sec. 3641 *et seq.*; Minn. Gen. Stats. 1913 sec. 7111 *et seq.*; Mo. R. S. 1909 sec. 2370 *et seq.*; Neb. R. S. 1913 sec. 1567 *et seq.*; N. Dak. Rev. Codes 1905 sec. 4048

II. That since said marriage [*or*, since the .... day of ....., 19..] and for more than one year immediately preceding the commencement of this action, the plaintiff and defendant have continuously resided, and now reside within this state. [*This allegation should affirmatively show residence within the state for the time required by the statute.*]

[*Or, if the marriage is alleged to have taken place within the state, insert here the following:* That since said marriage the plaintiff (and defendant) have continuously resided, and now reside, within this state.]

[*Or, if the adultery is alleged to have been committed within this state*: That the plaintiff, at the time of the commission of the several acts of adultery hereinafter mentioned, was and now is a resident of this state.]

III. That on the .... day of ....., 19.., at the house of E.... F.... [*or*, at No. .... Street] in the city of ..... the said defendant committed adultery with one M.... N.... [*Charge of repetition:* That a few days subsequently thereto, the defendant again committed adultery, at the house aforesaid, with the said M.... N....]

[*Where the precise time is not known:* That between the .... day of ....., 19.., and the .... day of ....., 19.., at times which the plaintiff is unable more particularly to state, the defendant committed adultery, *etc., as above.*]

[*Where the place is not known:* That on the .... day of ....., 19.., at some place in the city of ....., which the plaintiff is unable more particularly to state, the defendant, *etc., as above.*]

[*Where time and place are not known:* That at divers places within the city of ..... and at various times between the .... day of ....., 19.., last and this action, but at what particular times and places the said plaintiff is unable to state, the defendant has committed adultery with one M.... N....]

[*Where the paramour is not known:* That on the .... day of ....., 19.., at the house of E.... F.... [*or*, at No. ...., ... Street] in the town of ..... the defendant com-

et seq.; S. Dak. C. C. 1908 sec. 66 *et seq.*; Okla. Comp. Laws 1909 sec. 6172 *et seq.*; Oregon Laws 1910 sec. 507 *et seq* ; Tex. Civ. Stats. Ann. 1913 art. 4630 *et seq.*; Utah Comp. Laws 1907 sec. 1208 *et seq.*; Wash. Rem. and Bal. Code 1910 sec. 982 *et seq.*; Wyo. Comp. Stats. 1910 sec. 3924 *et seq.*

mitted adultery with a man [*or*, a woman] whose name is unknown to the plaintiff [*or*, one or more women, whose names are unknown to the plaintiff.]

IV. That said several acts of adultery were committed without the procurement, privity, or connivance of the plaintiff; and that she has never forgiven or condoned the same, nor voluntarily cohabited with the defendant since she obtained knowledge of said acts, and that three years have not elapsed since the discovery by the plaintiff of the offenses herein charged.

V. That there are no living children of said marriage [*or:* That there are living of the issue of said marriage .... children, named, *naming the eldest*, aged .... years, and, *give names and ages of other children.*]

VI. That the moral character of defendant is bad and such as to render him unfit to have the custody of said children [*or:* That defendant has no proper home for said children. *And state other facts showing that the custody of the children should be awarded to the plaintiff.*]

VII. That the plaintiff is wholly without property of her own. [*Or state what property the plaintiff has, and her health and capacity to earn.*]

VIII. That, as plaintiff is informed and believes, the defendant is possessed of personal property to the value of not less than ..... dollars, and of real property worth not less than the sum of ..... dollars; and that the defendant is engaged in the business of ..... [*stating it*] from which he derives an income of ..... dollars, or more, annually.

WHEREFORE the plaintiff demands judgment: (1) That the bonds of marriage subsisting between the plaintiff and defendant be wholly dissolved. (2) That the care and custody of said children may be awarded to her, the said plaintiff, and that the defendant be required to pay such suitable allowance in money for their support, maintenance and education as the court shall deem proper. (3) That the plaintiff be adjudged such alimony out of the defendant's estate, or such share of the defendant's property as shall be just and equitable. (4) That the plaintiff's name be changed to that by which she was known prior to such marriage. (5) That she recover the costs of this action. (6) And for such further relief as may be just.

1728. Complaint for limited divorce on account of cruel and inhuman treatment.

[*Allegations of marriage and residence for a time sufficient to satisfy the particular statute. See the preceding form.*]

That since said marriage the defendant has treated her in a cruel and inhuman manner, and since about the beginning of the year 19.., has repeatedly committed acts of cruelty and violence upon deponent and her children, and in particular as follows [*state the specific acts, e. g., thus:* On the .... day of ....., 19.., at ..... the defendant, without any provocation, struck and beat the plaintiff, severely injuring her face and breast; and on the .... day of ....., 19.., at ..... the defendant again, without any provocation, knocked the plaintiff down, and kicked her in the side; and that defendant's entire course of conduct towards the plaintiff, with rare intervals, has been for a long period uniformly brutal and abusive, he being constantly in the habit of applying abusive epithets to her, of threatening her with violence, and of striking and attempting to strike her; and it has become entirely unsafe for her to live with him].

[*Or:* That on the .... day of ....., 19.., the defendant forcibly expelled her from his residence, and has refused to permit her to return, and has since refused, *or neglected*, and still does refuse, *or neglect* to provide for her.]

[*Insert proper allegations as to children and property, as suggested in the preceding form.*]

WHEREFORE the plaintiff demands judgment of divorce from bed and board forever [*follow with other clauses of prayer, as in preceding form*].

1729. Allegation of wilful desertion.

That although the plaintiff has always conducted herself towards the said defendant as a faithful and obedient wife, the defendant, disregarding his duties as a husband, on or about the .... day of ....., 19.., wilfully deserted the plaintiff, and has ever since said time and for more than one year immediately preceding the commencement of this action, uninterruptedly continued said desertion without cause on the part of this plaintiff.

1730. Allegation of habitual drunkenness.

The defendant, disregarding his duties as a husband towards the plaintiff, has been an habitual drunkard for the space of more than one year immediately preceding the commencement of this action [*in Minnesota:* immediately preceding the filing of the complaint].

1731. Allegation of voluntary separation for five years.

That on or about the .... day of ....., 19.., the plaintiff and defendant agreed to live entirely separate and apart, and that ever since said time, in pursuance of said agreement, and for more than five years next preceding the commencement of this action, the plaintiff and defendant have voluntarily lived entirely separate from each other.

1732. Allegation of failure to support, by wife.

That ever since the .... day of ....., 19.., and for .... years prior to the commencement of this action, the said defendant * though of sufficient ability, has wholly refused and neglected to provide for the plaintiff.

1733. Allegation of conduct by husband rendering it unsafe for wife to live with him.

[*As in preceding form to the * and continuing*]: has been guilty of conduct toward the plaintiff which renders it unsafe and improper for plaintiff to live with said defendant, in this, that the said defendant has [*here state specifically the conduct complained of*].

1734. Allegation of impotency, or physical incapacity.

That the defendant was, at the time of said marriage, and ever since has remained, physically incapable of entering into the marriage state, or of consummating the said marriage by sexual intercourse, by reason of incurable personal defects, in that [*state the nature of the said incapacity briefly, e. g., thus:* the uterus and vagina of the said defendant were, at the time of such intermarriage, and for a long time previous thereto had been, in a diseased and in a schirrous, cartilaginous, and ulcerated state, and unnaturally thickened and indurated].

1735. For annulment of marriage on account of nonage.

I. [*State appointment of guardian, as in Form 863.*]

II. That on the .... day of ....., 19.., at ....., the plaintiff was in form married to the defendant.

III. That at the time of such marriage they were, and ever since have been, inhabitants of this state [*or state facts as to residence so as to bring the case within the particular statute*].

IV. That at the time of said marriage said plaintiff was but .... years of age, and incapable of contracting marriage.

V. That said plaintiff and defendant cohabited together until about the .... day of ....., 19.., since which time they have not cohabited as man and wife, said plaintiff, at the time said cohabitation ceased being less than .... years of age.

WHEREFORE plaintiff demands judgment that said marriage between said plaintiff and the defendant may be annulled and declared void, as provided by the statute, and for the costs of this action.

1736. For annulment on the ground of lunacy.

[*I, II and III as in preceding form, except that where the plaintiff has been restored to reason omit I.*]

IV. That at the time of such marriage she was a lunatic, and incapable of contracting a marriage; and has been ever since [*or*, and that she remained a lunatic for the space of about six months after such marriage.]

V. That her reason was restored about the month of ....., 19.., and that she is now of sound mind; but that she has not cohabited with the defendant since she was restored to a sound mind.

WHEREFORE, etc. [*as in preceding form.*]

1737. For annulment, on the ground of fraud by husband.

I. That on the .... day of ....., 19.., at ....., the plaintiff was in form married to the defendant.

II. That for the purpose of inducing the plaintiff to consent to the said marriage, the defendant falsely and fraudulently represented to her that he was one A.... B...., whom the plaintiff knew by reputation to be a respectable

and honorable man; and he concealed from the plaintiff his real name and character.

III. That the defendant's real name is, and always was C.... D...., and not A.... B....; and that he was and is a man of very bad repute, having been convicted of forgery, and confined in the state prison at ..... in this state, under sentence therefor, for .... years.

IV. That the plaintiff was induced to consent to the said marriage by the said representations, which she believed at the time of her said marriage to be true [and by her ignorance of the facts so concealed]; and that if the said representations had not been made to her [and said concealment had not been practiced] she would never have consented to the said marriage.

V. That immediately upon her discovery of the falsehood of the said representations, to-wit, on the .... day of ....., 19.., the plaintiff left the defendant's house, and has never since cohabited with him.

WHEREFORE, etc. [*as in Form 1735.*]

1738. The same, on the ground of fraud by wife.

[*As in preceding form, but substitute for paragraphs II and III, the following*]:

II. That for the purpose of inducing the plaintiff to consent to the said marriage, the defendant falsely and fraudulently represented to him that she was a chaste and virtuous woman, which representation the plaintiff believed to be true.

III. That defendant was in fact unchaste and of lewd habits, and was the mother of an illegitimate child; which facts the defendant fraudulently concealed from the plaintiff.

1739. For annulment on account of defendant's prior marriage, plaintiff acting in good faith (Neb. R. S. 1913 sec. 1593).

I and II. [*Allege residence and marriage, as in previous forms.*]

III. That said defendant and one E.... F.... were married at ..... in the state of ..... on the .... day of ....., 19.., and that they cohabited together as husband

and wife until about the .... day of ....., 19.., since which time the said E.... F.... remained absent from said defendant, and she had at no time prior to said marriage with the plaintiff, either seen or heard from him during said period, but was informed that he was dead, and so believed, and said marriage with plaintiff was entered into with the full belief on the part of the plaintiff and defendant that said E.... F.... was dead.

IV. That said E.... F.... was not dead, and is now living in the state of .....; that there has been no judgment of divorce between the said E.... F.... and the defendant, and that the defendant is still the lawful wife of the said E.... F....

V. That the issue of said marriage of the plaintiff with the defendant, now living, is as follows [*give names and ages*].

WHEREFORE plaintiff demands judgment that said marriage between the plaintiff and defendant may be declared null and void, and that defendant be adjudged not entitled to dower in plaintiff's real estate, or to any share or interest in his personal estate, and that said marriage be decreed to have been contracted in good faith with the full belief of the parties that E.... F.... was dead, and that the children of said marriage, as aforesaid, be adjudged legitimate issue of the plaintiff; and for such other relief as equity may require.

1740. Complaint to affirm validity of marriage.

[*Allege marriage and residence, as in Form 1727, or as the statute of the particular state may require.*]

III. That the said defendant, ever since the .... day of ....., 19.., has denied and still continues to deny the validity of the said marriage, and alleges that the same was void because [*here state the claim of invalidity made*]. But this plaintiff alleges that in truth and in fact [*here negative the claim of invalidity*] and the said marriage between plaintiff and defendant was and is a valid and binding marriage.

WHEREFORE plaintiff demands judgement that the said marriage be declared valid; an for such further relief as may be just and equitable, and for the costs of this action.

CHAPTER LXXIX.

COMPLAINTS IN ACTIONS BY CREDITORS OF DECEASED PERSONS AGAINST HEIRS, LEGATEES AND DEVISEES.

1741. Complaint in action at law by corporation against legatees of a deceased stockholder, upon a call made after the settlement of the estate of the stockholder for payment of the testator's subscription for stock.

1742. Complaint in action at law by the county judge against the heirs of a deceased surety upon a probate bond, the default in the bond having accrued after the settlement of the estate of the surety.

1743. Complaint in equitable action by creditor to recover against heirs and charge real estate received by them and set aside conveyances thereof as fraudulent, there having been no administration of the estate of the debtor.

1744. Outline of complaint against devisees of real estate. (Minnesota).

1745. Outline of complaint against heirs. (Minnesota).

The obvious intent of the statutes of the various states governing the settlement of the estates of deceased persons is that the claims of creditors shall all be presented to and allowed by the probate court, and paid by the executor or administrator out of the non-exempt property of the estate, real as well as personal, before distribution is made to either heirs, legatees or devisees.

Cases sometimes arise, however, where this result has not been accomplished, either by reason of entire lack of any administration proceedings, by failure to take the necessary steps to bar creditors in the administration proceedings, by reason of the fact that a contingent claim did not become absolute until the administration proceedings had been closed, and perhaps from other causes.

The statutes of Wisconsin seem to provide, in substance, three different remedies for cases of this nature:

(1) Sections 3269–3273, inclusive, Wis. Stats. 1913, provide for an action at law against the next of kin or legatees of the deceased, jointly or severally, to recover the value of

assets that may have been received by them from the estate of the deceased, provided that the plaintiff shows that he has been or will be unable to collect his debt, or some part thereof, in the probate proceedings. This action has been held to be maintainable by a creditor having a contingent claim which did not become absolute until after the time limited for presentation of claims in the probate court had expired and the estate closed (Mann v. Everts, 64 Wis. 372; 25 N. W. 209; S. M. Co. v. Murphy, 112 Wis. 614; 88 N. W. 583), also by a creditor holding an absolute claim where the estate of the decedent had never been administered upon in the probate court (McGonigal v. Colter, 32 Wis. 614).

(2) Sections 3274–3286, inclusive, Wis. Stats. 1913, provide for an action by any contract creditor of a deceased person against the heirs and devisees of such person to the extent of the real estate which has descended to or been devised to them. This action must be brought jointly against all the heirs or devisees. When brought against heirs the plaintiff must show that the personal assets of the deceased were insufficient to pay his debt, or that the debt or some part thereof can not be collected by proceedings in the probate court or from the next of kin or legatees. When brought against devisees the plaintiff must, in addition to these facts, show that the plaintiff is unable to collect his debt by action against the heirs. The judgment rendered is to be apportioned among the defendants in proportion to the value of the real estate secured by each, and the proper portion docketed against each defendant individually, and when so docketed becomes a lien on the real estate which descended or was devised to him in preference to other judgments for the debts of the heir or devisee. When the real estate has been aliened to an innocent purchaser before the filing of notice of the pendency of the action the judgment does not affect it, but if it be in the hands of a fraudulent grantee such grantee may be made a party to the action and the property reached. Adkins v. Loucks, 107 Wis. 587; 83 N. W. 934. This action was said, in Blakely v. Smock, 96 Wis. 611; 71 N. W. 1052, to be purely a legal action, but in Adkins v. Loucks, *supra*, it was said to be an equitable action, no reference being made to the previous case. The nature of the relief sought and obtainable in the action would seem to stamp upon it the character of an action in equity.

By the very terms of the sections by which it is created it is clear that it can not be maintained except when it is shown that no remedy can be obtained by an action at law against next of kin or legatees, under sections 3269-3273.

(3) Section 3860 and 3861 Wis. Stats. 1913 provide a third remedy in case of a contingent claim which becomes absolute at any time after the expiration of the time limited for the presentation of claims in county court. By these sections it is provided in substance that such a claim may be presented to the county court at any time within one year after it becomes absolute, and if allowed the executor or administrator shall pay it out of any assets he may then have or thereafter obtain, not exceeding the proportion paid to other creditors, and if he have not sufficient assets to pay the same, or the proper proportion thereof, the creditor may recover the balance from the heirs, devisees or legatees who have received property from the estate that was liable to pay debts of the deceased.

The General Statutes of Minnesota 1913 contain provisions quite similar to the Wisconsin provisions before cited as to actions by creditors against heirs, devisees or legatees of the deceased who have received real or personal property from the estate. Chapter 84, secs. 8179 to 8194 inclusive. In that state, however, a contingent claim which becomes absolute at any time before the final settlement of the estate must be presented to that court for allowance or be forever barred. Minn. Gen. Stats. 1913 sec. 7323.

There are no such provisions in Iowa. The early case of Reynolds v. May, 4 G. Greene, 286, seems to hold that there can be no such action; but in Janes v. Brown, 48 Iowa, 568, it is said that the question not having been argued, will not be passed upon. The Iowa Ann. Code 1897 sec. 3408 provides for an apportionment of costs in an action against heirs and devisees where the judgment is rendered against them in proportion to the amounts received by them from the estate, and authorizes a tender by each of his proportionate share of the liability, thus apparently recognizing that such an action may lie under some circumstances.

In the states of North Dakota and South Dakota the statutes are practically identical, and require the presentation of all claims contingent or otherwise to the probate court on penalty of being barred. If the liability is not absolute

at the time of the final settlement the court must order the executor or administrator to retain sufficient assets in his hands to pay it, in North Dakota and in South Dakota, must order the sum to be paid into court to await the determination of the question of absolute liability. N. Dak. Rev. Codes 1905 secs. 8099 and 8124; S. Dak. P. C. 1908, secs. 170, 296. In both states there are provisions for partial distribution of estates to heirs, devisees, or legatees before final settlement, upon their giving bond to pay their proportion of the debts, if necessary, and for the bringing of an action upon such bond in case of breach. N. Dak. Rev. Codes 1905 secs. 8203 to 8207; S. Dak. P. C. 1908 secs. 302 to 306.

In Nebraska contingent claims may be presented to the commissioners, and the court may order sufficient assets to be retained by the administrator or executor to discharge the claim, and if it become absolute and be proven to the satisfaction of the court at any time within two years after the time limited to present claims, the creditor will be entitled to receive payment to the same extent as other creditors, out of the property retained. Neb. R. S. 1913, secs. 1405-1407. If a claim becomes absolute at any time after the time limited for creditors to present claims it may be presented for allowance at any time within one year after it becomes absolute, and if it be allowed by the court the executor or administrator will be required to pay the same or such proportion as has been paid to other creditors, if he has sufficient assets, and if not, an action will lie against heirs, devisees or legatees who have recovered sufficient property from the estate. Neb. R. S. 1913, secs. 1408-1412. This action will not lie until the claim has been established against the administrator by proper legal proceedings in the probate or other proper court. Bunkworth v. Hazlett, 64 Nebr. 592; 90 N. W. 537.

The various statutes governing the presentation of claims against decedents' estates are cited in the note[1].

[1] Ariz. R. S. 1913 sec. 883 *et seq.*; Ark. Dig. of Stats. 1904 sec. 110 *et seq.*; Cal. C. C. P. 1906 sec. 1493 *et seq.*; Colo. Stats. Ann. 1911 sec. 7206 *et seq.*; Idaho Rev. Codes 1908 sec. 5460 *et seq.*; Kans. Gen. Stats. 1909 sec. 3515 *et seq*; Mont. Rev. Codes 1907 sec. 7653 *et seq.*; Mo. R. S. 1909 sec. 190 *et seq.*; Okla. Comp. Laws 1909 sec. 5274 *et seq.*; Oregon Laws 1910 sec. 1238 *et seq.*; and 484 *et seq.*; Tex. Civ. Stats.

1741. Complaint in action at law by corporation against legatees of a deceased stockholder, upon a call made after the settlement of the estate of the stockholder for payment of the testator's subscription for stock (precedent sustained in South Mil. Co. v. Murphy, 112 Wis. 614; 88 N. W. 583).

I. That said plaintiff is now, and at all the times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the state of Wisconsin.

II. That at and prior to the making of the subscription to the capital stock of said plaintiff hereinafter mentioned, the articles of incorporation of said company were duly filed and recorded with the register of deeds of the county of ....., Wisconsin, in which county said company is and ever since its organization has been located, and a duly verified copy of said articles duly filed with the secretary of state of the state of Wisconsin.

III. That in and by said articles the capital stock of said plaintiff is fixed at the sum of ..... dollars, divided into .... shares of ..... dollars each. That before the transaction of any business by the said corporation, with persons other than its members, more than ..... per cent. of its capital stock was duly subscribed in writing by sundry and divers persons, and more than .... per cent. of said capital stock was paid in in cash by said subscribers.

IV. That among other subscribers to the capital stock of said plaintiff company, one X.... Y...., now deceased, duly subscribed, on or about the .... day of ....., 19.., for .... shares of said stock, of the face value of ..... dollars per share, and in and by such subscription agreed to pay .....dollars on each share in cash, and the balance of such subscription as the same should be called by the plaintiff.

V. That on or about the .... day of ....., 19.., said cash payment of ..... dollars per share upon such subscription to said capital stock was duly made by each of the several subscribers to said stock, including said X.... Y.... That on or about the .... day of ....., 19.., a call of ....

Ann. 1913 art. 3458 *et seq.*; Utah Comp. Laws 1907 sec. 3848 *et seq.*; Wash. Rem. and Bal. Code 1910 sec. 1470 *et seq.*; Wyo. Comp. Stats. 1910 sec. 5595 *et seq.*,

per cent. of the face of each subscription to said stock was duly made by the plaintiff, and the amount thereof paid by each subscriber, including said X.... Y....

VI. That on or about the .... day of ....., 19.., said X.... Y.... died in the city and county of ....., Wisconsin, testate, being at the time of his death a resident of and freeholder in said county. That thereafter such proceedings were had in the matter of the estate of said X.... Y...., deceased, in the county court of said county, that the last will of said deceased was duly probated, letters testamentary issued to the executors named in said will, the debts of said deceased and legacies provided for in said will fully paid, the accounts of the executors allowed, and final distribution made of the residue of said estate to the heirs of said deceased, in equal, undivided shares, and said executors were fully discharged. That the final decree in said estate, and the final order of distribution therein, were duly made by said county court on or about the .... day of ....., 19.., and that thereby all of the residue of said estate of X.... Y...., deceased, was duly assigned to his children, in equal, undivided fifths, to-wit [*name the legatees, defendants*] who were his heirs and the residuary legatees under said will. That the amount of the property bequeathed and left to said defendants by said last will of said X.... Y...., deceased, and the amount actually received by them from the estate of their said ancestor, as this plaintiff is informed and verily believes, exceeded the sum of ..... dollars.

VII. That subsequent to the death of said X.... Y.... and subsequent to the making of the final order of distribution in the matter of said estate, and the assignment of the residue thereof to the defendants, a call was duly made, pursuant to resolutions of the stockholders of said plaintiff company and of the board of directors of said company, and in pursuance of the by-laws of said company theretofore duly made and adopted, upon all of the subscribers to the capital stock of said plaintiff, for.... per cent of the face of each share, payable on the .... day of ....., 19.., and .... per cent of the face of each share payable on the .... day of ....., 19..

VIII. That at the time of the making of said calls the by-laws of said plaintiff duly provided the manner in which

each subscriber, and his representatives and successors in interest, should be notified of said calls, and due notice was given to each of said defendants of said calls, pursuant to said by-laws, and due demand made for the payment thereof, but notwithstanding said demand, the said defendants have hitherto failed and neglected to pay the same or any part thereof, except the sum of ..... dollars.

WHEREFORE plaintiff demands judgment against the defendants for the sum of ..... dollars and interest, together with the costs and disbursements of this action.

1742. Complaint in action at law by the county judge against the heirs of a deceased surety upon a probate bond, the default in the bond having accrued after the settlement of the estate of the surety (adapted from complaint in Mann. v. Everts, 64 Wis. 372; 25 N. W. 209).

STATE OF .....
..... Court .....County.

A.... B.... as Judge of the County Court of ..... County,
Plaintiff,
vs.
C.... D.... and E.... F....,
Defendants.

The plaintiff, complaining of the defendants, alleges as follows:

I. That the plaintiff is judge of the county court of ..... county, Wisconsin, and brings this action as such judge, upon the bond hereinafter set forth, at the request and for the use and benefit of M.... N.... and O.... P....

II. Upon information and belief, that on or about the .... day of ....., 19.., one J.... K.... then being an inhabitant of the county of ..... aforesaid, died intestate, leaving surviving him his two children and only heirs at law, to-wit, the aforesaid M.... N.... and O.... P....

III. That on or about the .... day of ....., 19.., due proceedings in that behalf having been first had, one L....

M.... was appointed by the order of the said county court of ..... county, administrator of the estate of the said J.... K...., and then and there duly qualified as such administrator, and letters of administration upon said estate were thereupon duly issued to him, and he entered upon the discharge of the duties of his said trust. That said J.... K.... died seized of the following described lands, situated in the said county of ..... to-wit, [*describe lands*] and that said lands was all of the property left by the said J.... K.... at the time of his death.

IV. That afterwards, and on or about the .... day of ....., 19.., the said L.... M.... as administrator aforesaid, petitioned the said county court for leave to sell said real estate for the purpose of paying debts due and owing from the said estate of said J.... K...., and that upon due proceedings being had the said county court of ..... county, on or about the .... day of ....., 19.., made and entered an order granting the prayer of said petition, and licensed the said L.... M.... as administrator aforesaid to sell the said real estate and required him, the said L..... M..... before making such sale, to take and subscribe an oath as required by law, and to give a bond to the judge of said court in the sum of ..... dollars, with sufficient sureties to be approved by said judge, to account for the proceeds of such sale, and to dispose of the same according to law.

V. That thereupon the said L.... M.... as administrator aforesaid, did take and subscribe such oath, and on or about the .... day of ....., 19.., the said L.... M.... as principal, and one W.... X.... and one Y.... Z...., as sureties, did make, execute and deliver to the judge of said county court their bond in the penal sum of ..... dollars, as required by said order, of which bond the following is a copy [*insert copy of bond*].

VI. That said bond, and the sureties thereon, were by the judge of said court thereupon filed and approved, and that thereafter and on or about the .... day of ....., 19.., the said L.... M.... as administrator, pursuant to said license, sold said land and received therefor the sum of ..... dollars, and such sale was thereafter duly approved by said county court.

VII. That the said L.... M...., as administrator aforesaid, did not justly and truly account for the proceeds of the sale of such real estate, and did not dispose of the same according to law, and failed to make or file any account of his administration until on or about the .... day of ....., 19.., at which time he was cited by the said county court to appear and file his account of the proceeds of the said sale and the property received by him as administrator as aforesaid. That said L.... M.... accordingly filed an account with the said court to which objections were thereafter filed by the heirs of said J.... K...., and said matter was thereupon tried by the said ..... court, which court rendered judgment against the said L.... M.... disallowing said account in part and adjudging that the said L.... M.... had failed to account for the sum of ..... dollars, and interest thereon from the .... day of ....., 19.., and that he stood charged with said sum and interest, upon his account as aforesaid, which judgment still stands unreversed and unappealed from, and has never been paid.

VIII. That thereafter, on or about the .... day of ....., 19.., M.... N.... and O.... P.... applied to the said county court for leave to sue upon the bond of the said L.... M.... hereinbefore set forth, and on the same day the said court granted leave to the said M.... N.... and O.... P.... to sue upon said bond in the name of this plaintiff.

IX. Upon information and belief, that both said W.... X.... and Y.... Z...., died long prior to the commencement of this action, and prior to the said judgment upon said bond. That said W.... X.... died on or about the .... day of ....., 19.., then being an inhabitant of the said county of ..... That due proceedings in that behalf having been first had, the said county court of ..... county, on or about the .... day of ....., 19.., duly issued letters of administration on the estate of the said W.... X.... to one G.... H...., who thereupon duly qualified as such administrator and entered upon the duties of his office.

X. That said W.... X.... left him surviving the defendants C.... D.... and E.... F...., his children and only heirs at law, and that he died seized and possessed of personal property to the amount and value of ..... dollars, and the owner in fee simple of the following described real estate [*describe the real estate sought to be charged*]. That said

W.... X.... had no other property, to the knowledge or information of this plaintiff, and that there were duly proved and allowed by the said county court claims against the estate of the said W.... X.... to the amount of ..... dollars, which claims were fully paid by the said administrator out of the proceeds of the personal property left by the said W.... X...., and exhausted the entire amount of the personal property so left.

XI. That upon the payment of said claims the said G.... H...., as administrator aforesaid, petitioned said court for the final settlement of said estate and to be discharged as administrator, and that such proceedings were thereafter had upon said petition that on or about the .... day of ....., 19.., a final decree was entered by the said county court distributing the said real estate to the said defendants C.... D.... and E....F...., share and share alike, and said estate was then and there adjudged to be finally settled, and the said administrator G.... H.... was discharged. [*It should appear that this discharge took place before the adjudication upon the bond hereinbefore set forth.*]

XII. That the said Y.... Z...., the other surety upon the said bond, died leaving no property, either real or personal, and that this plaintiff has no remedy to recover the amount found due upon the said bond except the remedy which he seeks to enforce in this action. That the said real estate assigned, as aforesaid, to the defendants, was at the time said assignment was made and still is of the value of ..... dollars.

XIII. That prior to the commencement of this action the said M.... N.... and O.... P.... demanded of the said defendants that they pay the amount so adjudged to be due from the said L.... M.... as administrator aforesaid upon said bond, and that said defendants refused to pay the same or any part thereof.

WHEREFORE this plaintiff demands judgment against the said defendants for the sum of ..... dollars, and interest thereon from the .... day of ....., 19.., with costs, and that the said sum be adjudged a lien on the real estate so assigned to and held by the said defendants as aforesaid, and that the plaintiff have such other and further relief as may be just and equitable.

1743. Complaint in equitable action by creditor to recover against heirs and charge real estate received by them and set aside conveyances thereof as fraudulent, there having been no administration of the estate of the debtor (adapted from complaint in Adkins v. Loucks, 107 Wis. 587; 83 N. W 934).

STATE OF .....
.....Court .....County.

A.... B....,
Plaintiff,
vs.
C.... D...., E....
F.... and G....
H....,
Defendants.

The plaintiff, complaining of the defendants, alleges:

I. That one L.... M.... [*deceased debtor*] on or about the .... day of ....., 19.., for value received, made, executed and delivered to this plaintiff his promissory note in writing, of which the following is a copy [*insert copy of note*]; that no part of said note has been paid [*except, etc.*], that the plaintiff is still the owner and holder thereof, and that there is now due and owing to him thereon the sum of ..... dollars, with interest from ....., 19.. [*or otherwise set forth cause of action on contract against deceased, according to the fact*].

II. Upon information and belief, that the said L.... M.... removed from this state to the state of ..... in the month of ....., 19.., and has never returned to this state but remained a resident of said state of ..... until his death as hereinafter set forth, and that this plaintiff has been at all times since the execution of said note, and now is, a resident of this state.

III. Upon information and belief, that said L.... M.... died intestate in the said estate of ..... in the month of ....., 19.., and left him surviving the defendants C.... D.... and E.... F.... his children and only heirs at law. That the said L.... M.... left no personal property within

this state, but was at the time of his death the owner in fee of the following described real estate situated in the county of ..... in this state, viz. [*insert description*], and that upon the death of the said L.... M.... the title to the said real estate descended in equal shares to the said C.... D.... and E.... F.... and that said real estate was and is of the value of ..... dollars.

IV. That no administration upon the estate of said L.... M.... has been granted or had in this state, and that this plaintiff has been and will be unable with due diligence to collect his said debt, or any part thereof, by proceedings in the county court of said ..... county [*name county where real estate is situated*], or from any personal representatives of said L.... M.... or from any other person except as he may collect the same from the defendants in this action.

V. That on or about the .... day of ....., 19.., and before the commencement of this action, the said defendants C.... D.... and E.... F.... well knowing of the plaintiff's said claim against the estate of said L.... M.... and against their interests in said land, and with the fraudulent intent to defeat said claim and prevent the plaintiff from ever recovering the same in any way, executed and delivered to the defendant G.... H.... without consideration [*or state the consideration*] a warranty deed of said real estate, which deed was received by the said G.... H.... with full knowledge of the plaintiff's said claims and with knowledge also of the fraudulent intent of the defendants C.... D.... and E.... F.... in making the same, in which intent the said G.... H.... participated, and that said G.... H.... still holds the apparent title to said land [*or, if the transfer was merely colorable or accompanied by a secret arrangement to hold the land in trust, set forth the facts as it is expected to prove the same*].

WHEREFORE the plaintiff demands judgment against the said defendants C.... D.... and E.... F.... for the amount due on said note, with costs, to-wit, the sum of ..... dollars, with interest from ....., 19.., to be apportioned between the said defendants in equal shares; that the said conveyance to said G.... H.... be set aside and declared void; and that the said personal judgments be declared liens upon the interests of the said C.... D.... and E.... F.... in said real estate; and that said real estate be

sold to satisfy the same; and for such other and further relief as may be just and equitable.

1744. Outline of complaint against devisees of real estate (Minn. Gen. Stats. 1913 sec. 8182).

I. [*Allege a claim against decedent, in plaintiff's favor, not provable in the probate court, setting forth the claim as in a pleading.*]

II. [*Allege death of decedent testate, the admission of his will to probate, the appointment of executor, his due qualifications and administration of the estate, his discharge by the probate court and the closing of the administration proceedings.*]

III. [*Allege that defendants are the sole devisees and that the lands devised have been duly assigned to them by decree of the probate court, describing the lands and giving legal effect of the decree of distribution, or attaching a copy of the decree.*]

IV. [*Give value of the real estate devised to each defendant.*]

V. [*Allege that there are no personal assets of the estate applicable to the plaintiff's claim and state reason therefor, for example that they have been applied to pay expenses of administration or to claims of a prior class, etc.*]

VI. [*State why plaintiff's claim is not provable in the probate court.*]

VII. That by reason of the premises and of the statutes in such case provided defendants are indebted to plaintiff for his said claim, and interest accrued thereon, in the sum of ..... dollars in the following proportions and amounts: [*specify amounts due from each defendant.*]

WHEREFORE plaintiff demands judgment against defendants in the several amounts aforesaid, with costs apportioned as provided by statute, and that the same be levied upon the said realty of each.

1745. Outline of complaint against heirs (Minn. Gen. Stats. 1913 sec. 8182).

I. [*As in last preceding form.*]

II. [*Allege death of decedent intestate, issuance of letters of administration and closing of the estate.*]

III. [*Allege that the defendants, naming them, are the sole heirs at law, and allege the rendering of the final decree of distribution, attaching a copy, or pleading its legal effect.*]

IV. [*State the value of the real estate assigned to each defendant.*]

V, VI, and VII. [*As in last preceding form.*]

WHEREFORE, etc. [*Demand for judgment as in last preceding form*].

CHAPTER LXXX.

COMPLAINTS IN ACTIONS IN THE NATURE OF QUO WARRANTO AND ACTIONS TO VACATE CORPORATE CHARTERS.

1746. Complaint by private person for usurpation of elective local office. (Wisconsin).

1747. The same, for use in jurisdictions where it is not necessary to state the number of legal votes given nor the specific illegalities claimed.

1748. Complaint for usurpation of an office not elective.

1749. Complaint by private person for usurpation of appointive state office, by one not a citizen.

1750. Complaint by taxpayer for usurpation of county office by person elected but not eligible.

1751. Complaint by property owner against commercial railroad company, challenging its right to exercise franchise to build an elevated road, formally granted to it without authority of law by a city.

1752. Complaint by taxpayer of a village illegally incorporated against the village and its officers, challenging the corporate existence of the supposed village, and praying that the alleged village officers be ousted.

1753. Complaint in action by attorney-general or state's attorney to forfeit franchises of a street railway company and vacate its charter, because of failure to perform its duties.

1754. Complaint by attorney-general or state's attorney to vacate corporate charter for violation of law.

1755. The same, for failure to exercise its powers.

1756. Outline of complaint for violation of law by entering a combination in restraint of trade. (Wisconsin).

1757. Allegation of application to attorney-general to commence action, and his refusal.

The ancient common-law writ of *quo warranto* was a high prerogative writ by which one who had usurped an office, or franchise, or had forfeited it by neglect or misuse was called into court by the king and required to show by what authority he claimed to exercise it. The use of this writ became obsolete so early in the English law that it is impossible now to fix the time, and was succeeded by the crimir al informa-

tion in the nature of *quo warranto*. In most of the American states the terms "*quo warranto*" and "information in the nature of *quo warranto*" are used as synonymous and as referring not to the ancient and obsolete writ but to the information. State v. West Wisconsin Ry. Co., 34 Wis. 211; State v. Minn. Thresher Co., 40 Minn. 213; 41 N. W. 1020.

Where a constitution or statute confers upon any court the right to use the writ of *quo warranto* it is deemed to refer to the information in the nature of *quo warranto*. The ancient writ was a civil remedy, brought by the king to oust a usurper or take away a franchise; the information was originally a criminal proceeding to punish the offender by fine, but is now generally regarded as criminal only when brought by the attorney-general on his own information, and when brought by private parties in the cases allowed by statute it is regarded as a civil action though it may be brought in the name of the state. State v. Baker, 38 Wis. 71.

The constitution of some states grants to courts of general jurisdiction and to the appellate courts expressly or by necessary implication the right to issue the writ, meaning thereby the right to use the remedy by information, and in such states the right can not be taken away by statute. State v. Baker, *supra*. Statutory actions by which substantially the same relief may be obtained as by the common-law information have been provided in the following states, and it is to these actions that the forms used in the present chapter are adapted: Wis. Stats. 1913, chapter 149 secs. 3464 *et seq.;* Minn. Gen. Stats. 1913, sec. 8253 *et seq.;* N. Dak. Rev. Codes 1905, secs. 7349 *et seq.;* S. Dak. C. C. P. 1908, chapter 26 secs. 570 *et seq.;* Iowa Ann. Codes 1897 secs. 4313 *et seq.*

The information in the nature of *quo warranto* is preserved by name and its use regulated in Nebraska. Neb. R. S. 1913 sec. 8328 *et seq.*

In all cases where a statute requires that leave be obtained to bring the action, or that application be first made to a public officer, the fact of the obtaining of such leave or the making of such application and the refusal thereof should be alleged in the complaint or relation.

The statutes governing *quo warranto* in the states not hereinabove referred to are cited in the note [1].

1746. Complaint by private person for usurpation of elective local office (Wis. Stats. 1913 sec. 3466).

STATE OF WISCONSIN
..... Court, ... County

The State of Wisconsin, upon the complaint [*or* relation] of A.... B....,
Plaintiff,
vs.
C.... D....,
Defendant.

The plaintiff [*or* relator] who brings this action in the name of the state, complaining of the defendant, respectfully alleges:

I. That at a general [*or* municipal] election duly called and held in the county of ..... [*or* city, *or* town] pursuant to law, on the .... day of ....., 19.., for the election, among other officers, of a [*name office*], for the term of .... years from ....., 19.., there were duly cast [*state number, as:* two thousand and forty-five (2045)] legal votes for said office for the relator, and [*state number*] legal votes and no more for the defendant, and that there were no other legal votes cast for said office at said election, and that the relator was thereby duly elected to said office.

II. That notwithstanding the fact that the relator was legally and duly elected to said office as aforesaid, the canvassing board of said county [*or* city, *or* town] on the ....

[1] Ariz. R. S. 1913 sec. 1596-1602; Ark. Dig. of Stats. 1904 sec. 7983-7989; Cal. C. C. P. 1906 sec. 803-810; Colo. Code Ann. 1911 sec. 320-329; Idaho Rev Codes 1908 sec. 4612-4619; Kans. Gen. Stats. 1909 secs. 6275-6282; Mont. Rev. Codes 1907 secs. 6943-6968; Mo. R. S. 1909 secs. 2631-2636; Okla. Comp. Laws 1909 secs. 6190-6195; Oregon Laws 1910 secs. 363-377; Tex. Civ. Stats. Ann. 1913 art. 6398-6404; Utah Comp. Laws 1907 sec. 3609-3626; Wash. Rem. and Bal. Code 1910 sec. 1034-1048; Wyo. Comp. Stats. 1910 sec. 5073-5106.

day of ....., 19.., proceeded to canvass said returns and to make a statement thereof, and erroneously and illegally determined thereby that the said C.... D.... had received .... legal votes, and the said A.... B.... but .... legal votes, and unlawfully determined that the said C.... D.... had received the greatest number of votes and was elected to said office of ....., and thereupon, on said day, unlawfully made out and delivered to said C.... D.... an illegal certificate of election to the effect that said C.... D.... had received the greatest number of votes for said office and was duly elected thereto.

III. That in truth and in fact the said A.... B.... received the greatest number of legal votes cast for said office at said election; that forty-five of the votes so counted for the said C.... D.... were illegally cast by persons not entitled to vote at said election, to-wit:

In the town of ..... [*or* in the ..... ward] one of the election districts of said county [*or* city] E...., F.... and G...., whose votes were cast and counted for the defendant were minors under the age of twenty-one years, and X...., Y...., etc., whose votes were so cast and counted, were not at the time of casting said votes duly qualified electors, but were persons of foreign birth who were not citizens of the United States or of the State of Wisconsin, and had never been naturalized by their own act or by the act of their parents, and had never declared their intention to become citizens of the United States.

In the town of ..... [*or* in the said ..... ward], one of the election districts of said county [*or* city], L.... M...., N...., etc., whose votes were so cast and counted, were not at the time entitled to vote in said election district, as they did not in fact actually reside in said district, and never had resided therein.

[*Allege any other illegal votes cast for defendant, giving names and grounds of illegality specifically. Wis. Stats. 1913 sec. 3468.*]

[*If relator has qualified for the office, set forth the facts as follows, although the qualification before action seems not necessary under Wis. Stats. 1913 sec. 3471.*]

IV. That on the .... day of ....., 19.., the said relator duly qualified as such ..... by taking and subscribing the oath of office as required by the constitution and laws of

this state, and filing the same with O.... P.... and by duly executing the official bond, with sureties, in manner, form and substance as required by law, in the sum of ..... dollars.

V. That on the .... day of ....., 19.., the said defendant usurped and intruded into the said office of ..... of said county [*or* city], and has ever since unlawfully exercised the same and excluded the relator therefrom, and withheld, and still withholds, the same and the fees and emoluments thereof from him.

WHEREFORE the plaintiff demands judgment that the said C.... D.... be adjudged guilty of usurping, intruding into and unlawfully holding said office, and that he be excluded from the same and the privileges and franchises thereof; that the said A.... B.... be entitled to have, hold and exercise said office, by virtue of said election; that the plaintiff recover the costs of this action.

1747. The same, for use in jurisdictions where it is not necessary to state the number of legal votes given nor the specific illegalities claimed (1 Abbott's Forms, form 697).

I. That on the .... day of ....., 19.., at an election duly held in the [*designate the county or district*] of this state, pursuant to the statute, for the election, among other officers, of [*name officer*] for the term of .... years from the .... day of ....., 19.., the said A.... B.... received the greatest number of legal votes [*or* the majority, *according to the statute*] for the said office, and was duly elected.

II. That on the .... day of ....., 19.., the defendant usurped the said office, and has ever since unlawfully exercised the same, and withheld the same from the said [*relator*].

WHEREFORE the plaintiff demands judgment, with costs, that the defendant is not entitled to the said office, and that he be ousted therefrom; that the said [relator] is entitled to the office, and to assume the execution of the duties of the same on taking the oath and filing the bond prescribed by law.

1748. Complaint for usurpation of an office not elective (1 Abbott's Forms, form 698).

I. That at the times hereafter mentioned, in the municipal corporation entitled ..... there was, and still is, an executive department created and existing under the laws of this state, known as the street department, the chief officer of which department is called the street commissioner, which office of street commissioner was and is a public office in said city.

II. That in the month of ....., 19.., one J.... S.... was duly elected to said office for the term of .... years from the .... day of ....., 19.., and on said day entered upon the duties of said office, and discharged the duties thereof until the .... day of ....., 19.., when he died, whereby the office became, and thence, until and at the time of the appointment hereinafter referred to, continued vacant.

III. That after said death, and on the .... day of ....., 19.., the said [relator] was appointed to said office by the mayor of said city, with the advice and consent of the board of aldermen of said city, and thereafter, and on the same day, in due form of law, and according to the ordinances of the corporation of said city, he gave sufficient security for the performance of his duties as such street commissioner, in the form and amount for that purpose prescribed by the said ordinances, and took and subscribed, before the mayor of said city, and filed his oath in the following form [*copy oath*]. And that he accepted such appointment, and in all respects qualified himself to assume such office, and perform the duties thereof.

IV. That the defendant, claiming to have been appointed by the governor of the state of ..... to fill the aforesaid vacancy, created by the death of said J.... S.... and without any other or any legal warrant, right, or grant whatever, intruded into and usurped said office, and still unlawfully holds and exercises the same.

WHEREFORE, etc. [*as in last preceding form*].

1749. Complaint by private person for usurpation of appointive state office, by one not a citizen (from State v. McDonald, 108 Wis. 8; 84 N. W. 171).

[*Title.*]

The relator above named, who brings this action in the name of the state of Wisconsin, complains and alleges:

I. That in the month of April in the year 19.., said A.... B.... was duly appointed by the governor of Wisconsin to the office of ..... for the .... district of Wisconsin, and during the same month, in pursuance of appointment aforesaid, duly qualified as such officer and continued to occupy and exercise said office up to and including the month of ....., 19.., and has always been and now is entitled to said office.

II. That in the month of ....., 19.., and as affiant is informed and believes, on the .... day of ....., 19.., the defendant C.... D.... was appointed to said office by the governor of said state of Wisconsin, and on or about the .... day of ....., 19.., attempted to qualify therein.

III. That at the time of his said appointment, said C.... D.... was not a citizen of the state of Wisconsin. That up to the .... day of ....., 19.., he was a subject of the queen of Great Britain. That on said last named date said C.... D.... completed his naturalization as a citizen of the United States in the district court of ..... county, Minnesota, at which time he renounced his allegiance to the queen of Great Britain and was declared and adjudged by said district court of ..... county, Minnesota, to be a citizen of the United States. That thereafter, said defendant continued to be, and as complainant is informed and believes is now and was at the time of his said appointment to said office, a citizen of the state of Minnesota. That a few days before his said appointment—the exact number of days is unknown to the complainant, but as said complainant is informed and believes, in the month of ....., 19..,—said defendant became a candidate for said office then held and exercised by the complainant. That said defendant, knowing that it was necessary under the laws of the state of Wisconsin to be a citizen of Wisconsin in order to be eligible to said office, immediately thereafter pretended to take up a residence in the city of ....., in ..... county, Wisconsin. That before

said time said defendant was a resident and citizen of the state of Minnesota. That said action of defendant was solely and wholly to obtain said office. That said defendant at the time he pretended to take up said residence in Wisconsin, and up to the time of his appointment, had no intention of taking up a permanent residence in said state of Wisconsin, or of becoming a citizen of said state of Wisconsin, nor at the time of his said appointment did said defendant have any intention of permanently residing in said state or of being a citizen of said state. That at the time said defendant took up said pretended residence in the state of Wisconsin as aforesaid, during the time of his said pretended residence in Wisconsin, and up to the time of his appointment to said office, said defendant intended to leave the state of Wisconsin and return to the state of Minnesota, in case he should be unsuccessful in his candidacy for said office. That said action of defendant in so moving into Wisconsin was a mere subterfuge and makeshift to bring him apparently within the requirements of the law as to citizenship in order to hold said office.

IV. That on or about the .... day of ....., 19.., and after said defendant had attempted to qualify in said office, said complainant, A.... B...., delivered to defendant most of the books and effects pertaining to said office and yielded to said defendant's supposed incumbency of said office. That at the time when the complainant so delivered said books and effects, and so yielded to said defendant, complainant did not know of defendant's disqualification for said office, and did not know the facts hereinbefore set forth pertaining to defendant's residence or citizenship, nor any of said facts, but complainant supposed said defendant to be a citizen of Wisconsin at the time of his said appointment and supposed him to be eligible to said office.

V. That defendant unlawfully usurped said office on or about the .... day of ....., 19.., and has ever since continued to unlawfully usurp said office, and now unlawfully usurps said office and exercises the same, and has since the .... day of ....., 19.., withheld and still withholds the same, and the fees and emoluments thereof, from complainant. That complainant has demanded of defendant that he surrender up said office and the books and effects of said

office to complainant, all of which defendant has refused and still refuses to do.

VI. That complainant has informed the attorney-general of Wisconsin of the foregoing facts and demanded that he bring in action in the name of the state of Wisconsin to oust said C.... D.... from said office, but said attorney-general refused and still refuses to act.

WHEREFORE complainant demands judgment against said defendant C.... D....; that said defendant C.... D.... be adjudged guilty of usurping, intruding into and unlawfully holding said office, and that he be excluded from the same and the privileges of the same; that said A.... B.... be entitled to have, hold and exercise said office and to the fees, emoluments and privileges thereof; that said A.... B.... recover the costs of this action against said C.... D....; and for all further and other relief as the court may deem just.

1750. Complaint by taxpayer for usurpation of county office by person elected but not eligible (from complaint in Fordyce v. State, 115 Wis. 608; 92 N. W. 430).

[*Title.*]

The above named relator brings this action in the name of the state of Wisconsin against the above named defendant, and for a complaint in this action alleges:

I. That the relator now is and for more than two years prior to the commencement of this action, including all the times hereinafter mentioned, has been a resident, freeholder, taxpayer and duly qualified elector and voter in ..... county, Wisconsin, and now resides, and during all of said times resided in the city of ..... in said county, and now is and during all of said times has been a citizen of the United States and of the state of Wisconsin.

II. That on the .... day of November, 19.., at a general election held in and for said county of ..... pursuant to law, for the election, among other officers, of a county superintendent of schools of said county, for the term of two years from the .... day of ....., 19.., the said defendant received the greatest number of votes cast for said office, and that thereafter the canvassing board of said county proceeded

to canvass the returns of said election from the various towns, wards, villages, and election districts, and determined that said defendant was elected to the said office of county superintendent, and thereupon issued a certificate of election to the effect that the defendant received the greatest number of votes for said office, and was elected to said office; the said certificate of election was delivered to said defendant, and thereafter and on the first Monday of ....., 19.., the said defendant attempted to qualify as such county superintendent, by taking and subscribing the oath of office in the form required by law, and filing the same with the county clerk, and executed her official bond in the form required by law, and in the amount and with the sureties required by the county board of said county, and filed the same in the manner required by law.

III. That said defendant is not and never has been eligible to the office of county superintendent of schools, and was not eligible to said office at the time of her election; that she did not at said time nor at any other time hold a certificate entitling her to teach in any of the public schools in said state; that she did not at said time, nor at any other time, ever hold a county superintendent's certificate issued by the state superintendent after examination by and upon the recommendation of the board of examiners for state certificates, as required by law, and did not at that time, nor at any other time ever hold any county superintendent's certificate of any kind whatever; that she had never held the office of county superintendent of schools on or prior to the first day of May, 19..

IV. That the name of said defendant was illegally placed upon the official ballot of said county, as a candidate for the office of county superintendent of schools of said county at said election; that the defendant failed and neglected to file in the office of the county clerk of said county, ten days before the day of said election, or at any other time whatever, any proof whatever of having taught in any of the public schools of this state, or any copy of a certificate entitling her to teach in any of such schools, or any certificate known as a county superintendent's certificate, or any proof that she held the office of county superintendent of schools in this state on or before the .... day of ....., 19.., that said defendant failed and neglected to file in the office of the

county clerk of said county any proof whatever that she held any certificate entitling her to teach in any of the schools in this state, or any copy of any such certificate, or any county superintendent's certificate, or any copy of any such certificate, or any proof whatever showing that she was entitled to hold said office, or was eligible thereto.

V. That on said first Monday of ....., 19.., the defendant usurped and intruded into the said office of county superintendent of said county and has ever since unlawfully exercised the said office, and still holds the same with the fees and emoluments thereof, and threatens to, and will unless restrained by the court, collect, hold and receive the fees and emoluments of said office.

WHEREFORE the state, upon the complaint of the said relator, demands judgment against said defendant that the said defendant be adjudged guilty of usurpation, intruding into and unlawfully holding said office, and that she be excluded from the same, and from the privileges and franchises thereof; that she be required to return to the county all fees and moneys which she has, or may receive during the pendency of this action, by virtue of said office and that the relator recover his costs in this action, together with such other and further relief as may be proper.

1751. Complaint by property owner against commercial railroad company, challenging its right to exercise franchise to build an elevated road, formally granted to it without authority of law by a city.

[*Title.*]

The relator, who brings this action in the name of the state, complaining of the defendant, respectfully alleges:

I. That the defendant is a railroad corporation organized and incorporated under and by virtue of section .... of the ..... statutes of 19.., and that a copy of its articles of organization is hereunto annexed and made part hereof, marked Exhibit A.

II. That the relator is a resident in and taxpayer in the city of ....., county of ..... in the said state of ..... and is the owner of a certain parcel of land upon ..... street, in said city, described as follows [*insert description.*]

III. That by reason of the enactment of the ordinance hereinafter named, and the holding by the defendant of the franchises therein attempted to be conferred, plaintiff's said real estate was greatly diminished in value, and that the construction of the elevated railway hereinafter described will necessarily result in further great damage to the value of said real estate and to said relator.

IV. Upon information and belief, that on or about the .... day of ....., 19.., the said defendant made application to the mayor and common council of the city of ..... in words and figures as follows [*insert copy of application for ordinance*] that annexed to said application was a copy of a proposed ordinance granting to said defendant the right and authority to construct, maintain and operate an elevated railroad with two tracks, and such curves, spurs, sidetracks, switches, stations and platforms as said railway company, its successors or assigns might deem necessary for operating its said railroad along and upon the streets in said proposed ordinance named, and that thereafter, upon said application, the said ordinance was brought before the common council of the city of ..... pursuant to a notice of application therefor duly published according to law, and such proceedings were had thereon by the said common council that upon the .... day of ....., 19.., said common council duly passed said ordinance, and the same was approved by the mayor of said city, and that a true copy thereof is hereto attached and made part hereof, marked Exhibit B.

V. That after the passage, approval, and publication of said ordinance as aforesaid, the said defendant filed with the said city clerk of said city of ..... his written acceptance of the said ordinance under seal, and that said defendant now holds the said franchises granted or attempted to be granted by said ordinance, and exercises the said franchises, by proceeding to act thereunder, and by said written acceptance.

VI. That the lands of the plaintiff hereinbefore set forth front and abut upon ..... street in the said city of ..... for a distance of .... feet, and that the elevated railroad proposed to be built under said ordinance by the said defendant runs upon and along the said ..... street, and in front of and upon the said premises of the relator for the said distance of .... feet, and that the defendant claims the

right under and by virtue of said ordinance, and the franchises thereby attempted to be granted, to build, maintain and operate the said elevated railroad upon said street, and in front of and upon the relator's said real estate.

VII. Upon information and belief, that said defendant has no power or authority under its charter or under the laws of the state of ..... to construct, maintain, or operate said elevated railroad in said ordinance described or any similar elevated railroad upon said ..... street, or upon any of the streets of the said city of ....., and that said defendant has no power or authority to accept, hold, or exercise the franchises attempted to be created by the said ordinance, and that the said common council of the said city of ..... has no right, power, or authority to confer upon the defendant the rights, privileges and franchises granted in said ordinance.

VIII. That heretofore, on or about the .... day of ....., 19.., the relator applied, upon verified petition, to the attorney-general of the state of ..... to bring action in the name of the state of ..... against the said defendant for the purpose of requiring the said defendant to show cause by what authority it attempts to hold and exercise said franchises, but that the said attorney-general upon the date last aforesaid refused to act in said matter, and declined to bring the said action.

IX. That the relator thereafter executed and filed with said attorney-general a bond running to the state of ....., conditioned for the payment of all costs and disbursements which might be adjudged against the relator in this action, which bond was sufficient for said purpose in form and sureties, and was approved by said attorney-general.

WHEREFORE plaintiff demands judgment that said defendant be required to show cause by what authority it holds and exercises the franchises attempted to be granted by said ordinance, and that in default of such showing said defendant be adjudged guilty of unlawfully holding said franchises or privileges, and be excluded from the same, and be adjudged to pay a fine, together with the costs and disbursements of this action; and that the plaintiff have such other and further order, judgment, or relief as may be equitable.

1752. Complaint by taxpayer of a village illegally incorporated against the village and its officers, challenging the corporate existence of the supposed village, and praying that the alleged village officers be ousted (adapted from complaint in State v. Leischer, 117 Wis. 475; 94 N. W. 299).

I. That the defendant [*name alleged village*] is a pretended village or municipal corporation, in the county of ..... in said state, attempted to be organized under the laws of the state of ....., but never in fact legally organized or existing[2], and that the defendants C.... D.... [*etc., naming acting officers*], now claim to and do in fact exercise authority as officers of said pretended village, and are exercising authority as such village officers, levying taxes, taking charge of highways, and otherwise usurping full power and authority as such village officers within the territory hereinafter described.

II. That the relator is a resident within the limits of said alleged village, and owns real estate and is a taxpayer within the said territory over which the said last named defendants are wrongfully exercising the powers of village officers as aforesaid.

III. That [*here set forth the steps taken to incorporate the said supposed village, and allege specifically the defects in the proceedings which render the attempted incorporation void, if the defect be that there were illegal votes cast at the election called to decide the question, the number of votes cast for and against the proposition should be specifically stated, and the alleged illegal votes named, and the grounds of illegality set forth as in the first form in this chapter*].

IV. That at a pretended election held in said pretended village on the .... day of ....., 19.., the said defendants C.... D.... [*etc., naming defendants*], were in form elected officers of said village, to-wit: C.... D...., president; E.... F...., clerk [*name defendants and their respective offices*] and that each and all of said defendants thereafter in form qualified for their respective offices, and thereafter assumed

[2] The *de facto* village is a necessary party to the action, notwithstanding it may have no legal existence. State v. Leischer, 117 Wis. 475, 94 N. W. 299.

and now assume to discharge the duties of village officers in said territory, and unlawfully usurp the power and authority to act as such officers; and that said defendants have and claim no other right or authority to act as such officers, nor has such pretended village any right or authority to exist as a village other than the right attempted to be conferred and acquired by the proceedings hereinbefore set forth.

V. That the relator, on the .... day of ....., 19.., and before the commencement of this action, made due application to the attorney-general of the state of ..... to commence an action of *quo warranto* against said pretended village and said pretended officers, but that said attorney-general refused and still refuses so to do.

WHEREFORE plaintiff demands judgment that said pretended village of ..... be adjudged an unlawful usurpation of village government; that said defendants C.... D...., etc., be adjudged to have unlawfully usurped their said pretended offices, and that they be ousted therefrom; and that plaintiff have such other judgment or relief as may be just, and for costs.

1753. Complaint in action by attorney general or state's attorney to forfeit franchises of a street railway company and vacate its charter, because of failure to perform its duties (adapted from State v. Madison S. R. Co., 72 Wis. 612; 40 N. W. 487).[3]

STATE OF .....
..... Court, ... County.

State of ..... on relation of A.... B...., Attorney General of said State [*or* State's Attorney for ..... county],
Plaintiff,
vs.
C.... D.... Street Railway Company,
Defendant.

The complaint of the state of ..... on the relation of A.... B...., respectfully shows and alleges:

I. That the defendant, the C.... D.... Street Railway company, is a corporation duly created and existing under the laws of said state, and that it was organized for the purpose of constructing and operating a street railway in the city of ..... in said state, and that it has its principal office and place of business in said city of .....

II. That on the .... day of ....., 19.., the relator duly made application to the ..... court of ..... for leave to bring this action, in and by a duly verified petition signed by himself [*or* by E.... F....] and that on the .... day of ....., 19.., the said court by order duly entered, granted leave to the said attorney-general [*or* state's attorney] to bring this action, and that satisfactory security has been given by bond, with sufficient sureties, duly executed and delivered, to indemnify the said state against all costs and expenses to be incurred in this action, and that this action is one of public interest.

III. That on or about the .... day of ....., 19.., in and by an ordinance of the said city of ..... entitled "An Ordinance Conferring Certain Rights and Privileges upon the C.... D.... Street Railway Company," authority and permission was granted to the said C.... D.... street railway company, to lay and maintain a single or double track street railway on certain streets of said city, and operate street cars thereon by electric power, with all necessary switches, curves, turn-outs and other appliances and conveniences, on the express condition that the said C.... D.... street railway company should construct and have in operation one line of the said railway extending from ..... to ..... on or before the .... day of ....., 19.., and should thereafter at all times during the continuance of the rights granted by said ordinance maintain and operate the same; that said franchise was limited by said ordinance to a period of twenty-five years from the date of the passage thereof; and it was further conditioned that if said railway company failed or neglected to construct and complete, and thereafter operate the said lines of railway over the routes

[3] See note to Form 133 as to the necessity of obtaining leave to bring this action.

and within the time in said ordinance provided, then said company should forfeit all rights, privileges and franchises in said ordinance granted, and the same should become null and void, and of no effect, and that said railway company, as a condition of accepting the rights and authority thereby granted, agreed to construct the said railway in a good and substantial manner, and in accordance with the approved plans for the construction of such railway, and further agreed [*here insert any further conditions contained in the ordinance with regard to the building of the road, its maintenance, and the duties of the street railway company which are claimed to have been violated*].

IV. That it was further enacted in and by said ordinance that the same should be null and void, and that all rights granted thereby should cease and be of no effect unless said company should file a written acceptance of the same with the clerk of said city within sixty days after the passage thereof; that said ordinance was passed by the common council of the said city of ..... on the .... day of ....., 19.., and duly signed by the mayor of said city on the .... day of ....., 19.., and that the said C.... D.... street railway company thereafter accepted the privileges and franchise granted in said ordinance, by filing with the clerk of said city its written acceptance thereof on the .... day of ....., 19..

V. That the said C.... D.... street railway company, by virtue of the rights and privileges granted by said ordinance, thereafter constructed a street railway track beginning at [*name and describe the track constructed*] and that the said C.... D.... street railway company thereafter commenced to operate the said street railway track by the running of cars thereon, but that said street railway company wholly failed and neglected to comply with the conditions and provisions of said ordinance, in the following respects, to-wit, that the said company has wholly failed and neglected to grade the streets between the rails of its said track, so as to restore said portions of the streets to the proper condition of repair and to such a state of usefulness as to make said streets as serviceable and useful as is needed for the ordinary public use of the same; that the said defendant has wholly failed and neglected [*here set forth particularly all*

breaches of the ordinance which are relied upon as grounds for vacating the franchise].

WHEREFORE judgment is demanded against said defendant that it may be adjudged to have forfeited, lost and surrendered all rights and privileges granted to it by the said ordinance, and all its corporate rights, privileges and franchises, and that by the judgment of this court it be excluded from the exercise of said rights, franchises, corporate rights, and privileges, and that it be dissolved and its affairs wound up; that its property be sold and converted into money; that a receiver be appointed for the purpose of closing up the affairs of said corporation, and its property be applied to the payment of its debts and liabilities, together with the costs of this action, and that such further or other judgment be rendered as may be just and equitable.

G.... H...., Attorney General.

[*Verification.*] [*or,* State's Attorney of ..... County.]

1754. Complaint by attorney general or state's attorney to vacate corporate charter for violation of law.[4]

I. [*As in last preceding form, setting forth fully the corporate powers.*]

II. [*Allege obtaining of leave to sue, as in last preceding form.*]

III. That said corporation, for the space of .... months past has exercised, without any warrant, charter or grant, the franchise of banking, and has issued notes, received deposits, made discounts, and transacted other banking business to which it was not authorized, and has exercised franchises not conferred upon it by law. [*Or allege violation of its charter or of law, according to the fact.*]

WHEREFORE the plaintiff demands judgment, that the defendant [*corporation*] be excluded from all corporate rights, privileges, and franchises, and that the charter of said corporation be annulled and vacated; and for the costs of this action.

[4] See note to Form 133.

1755. The same, for failure to exercise its powers.

[*I and II as in last preceding form.*]

III. That said corporation, without any reasonable cause therefor has failed to exercise its powers and has omitted to carry on, or transact any of its lawful and ordinary business since about the .... day of ....., 19.., and has permitted its ordinary and lawful business to be suspended for a period of more than ..... years, next before the commencement of this action, and still permits the same to be suspended, whereby it has forfeited the rights, privileges and franchises granted to it and acquired by it under the laws of this state.

WHEREFORE, the plaintiffs demand judgment that said corporation be dissolved, its charter vacated, and its stock, property, things in action and effects be distributed among its creditors and stockholders, and that a receiver thereof be appointed, and that the plaintiffs may have such other and further relief as may be just and equitable, with costs.

1756. Outline of complaint for violation of law by entering a combination in restraint of trade (Wis. Stats. 1913 sec. 1791j).

[*I* and *II as in last preceding forms.*]

III. [*Allege the making of the illegal agreement, conspiracy or combination in restraint of trade by the defendant with other corporations or persons and its terms, as definitely as possible, and allege also the fact, if it be a fact, that by reason of said agreement or combination competition in the supply or price of any article of commerce has been prevented or controlled.*]

WHEREFORE, plaintiffs demand judgment that defendant, the ..... Company be dissolved, its charter forfeited and cancelled, and its corporate existence annulled; that it be enjoined from acting as a corporation, and a receiver of its property be appointed, and for such other and further relief as may be appropriate, with costs.

1757. Allegation of application to attorney-general to commence action, and his refusal.

[*To be inserted where action is brought on relation of private person, and the statute requires that application be first made to the attorney-general or state's attorney.*]

That on or about the .... day of ....., 19.., and before the commencement of this action, the relator [*or* plaintiff], made application in writing to the attorney-general of the said state of ..... [*or*, to the state's attorney for the county of .....] that he commence an action in the nature of an action of quo warranto against the said ..... for the purpose of punishing the said usurpation of office on the part of the said C.... D.... [*or* for the purpose of vacating the corporate charter of the defendant, *or otherwise state the purpose of the action*], but that the said attorney-general refused and still refuses to commence said action.

CHAPTER LXXXI.

COMPLAINTS IN VARIOUS ACTIONS AUTHORIZED BY STATUTE.

1758. Complaint for statutory forfeiture, general form.
1759. Complaint or affidavit of deputy game warden for violation of game law in action for forfeiture before justice of the peace. (Wisconsin.)
1760. Allegation of a foreign statute imposing the liability sued on.
1761. Complaint by wife against saloonkeeper for damages resulting from sale of liquors to husband, an habitual drunkard. (Wisconsin.)
1762. Complaint in the name of the state upon saloonkeeper's bond, when damages have been recovered in previous action against saloonkeeper. (Wisconsin.)
1763. Complaint by wife against one who sold liquor to husband, causing his intoxication and resulting damage to his wife. (Iowa.)
1764. Complaint by married woman on saloonkeeper's bond. (South Dakota.)
1765. Complaint by minors on bonds of several saloonkeepers. (Nebraska.)
1766. Complaint for damages against a witness for disobeying a subpoena.
1767. Complaint to recover a forfeiture for violation of a city ordinance.
1768. Complaint against a railroad corporation for exacting an illegal rate of fare.
1769. Complaint by state against member of board of review to recover forfeiture for intentional omission of property from tax roll.
1770. Outline of complaint on saloonkeeper's bond (Minnesota.)

In Wisconsin a penalty or forfeiture for an act not a misdemeanor is to be recovered in a civil action brought in the name of the state, or in case any portion of the forfeiture is payable to a person such person may join as plaintiff with the state. Wis. Stats. 1913, secs. 3294, 3295-3297. It is sufficient to allege in the complaint that the defendant is indebted to the plaintiff in the amount of the forfeiture according to the provisions of the statute, naming section and chapter. Id. sec. 3295. A forfeiture for violating a municipal ordinance is to be sued for by the municipality in its own name. Id. sec. 3303. In Minnesota the action is civil

and to be prosecuted by the officers or persons to whom they are by law given, or who are especially authorized to recover them. Minn. Gen. Stats. 1913, sec. 8250. In Iowa the action is to be prosecuted by the officer or person to whom the forfeiture by law belongs in whole or in part, or the officer to whom it is to be paid when collected. Iowa Ann. Code, 1897 secs. 4338, 4339.

In North Dakota a penalty or forfeiture for an act not a misdemeanor is to be sued for in a civil action brought by the attorney-general or state's attorney in the name of the state if the entire sum is payable to the state; by the proper public corporation if it is payable to such corporation, and if payable in part to the state and in part to an individual, then by either party or by both jointly. N. Dak. Rev. Codes 1905 secs. 7394, 7395. The same provision as to the allegations of the complaint is made as in Wisconsin. Id. sec. 5787.

In stating the facts of a case under a statute, care must be taken to make a case clearly within the statute; and this may generally be best done by pursuing the words of the statute, adding such particulars of time, place, and value as may be necessary to give definiteness and certainty to the claim; although, where the plaintiff is a stranger to the transactions, and defendant may be presumed cognizant of them, generality of statement is permitted.

It is not necessary to aver a *scienter* in the violation, unless the statute gives the action only for a knowing violation.

A distinct proviso, whether in the same section, or another, furnishing mere matter of excuse for the defendant, need not be negatived; but, generally, an exception incorporated in the very clause should be negatived. The true test, under the code, is this: if the burden of proof is on the plaintiff the matter should be alleged. If it is matter of defense, to be established by the defendant in order to make the exception or proviso avail him, the plaintiff need not notice it.

Numerous violations of a single provision,—e. g., a single subdivision of the section of the statute,—may be alleged in one count. But there should be a separate count for violations of a distinct subdivision.[1]

[1] In Oregon and Washington all fines and forfeitures are recovered by action at law in the name of the officer or person to whom they are given by law, or who is by law authorized to prosecute for them. Oregon Laws 1910 sec. 353; Wash. Rem. and Bal. Code 1910 sec. 963.

1758. Complaint for statutory forfeiture (general form).

I. That on the .... day of ....., 19.., at ..... the defendant [*here state acts constituting a violation of the statute, either following the words of the statute, or setting forth the facts more specifically*].

II. That thereby the defendant became indebted in the amount of [*the penalty or forfeiture*] to the [*one for whose use the same is given*] whereby an action accrues according to the provisions of [*stating the title or the subject-matter of the statute, and naming the section, title, and chapter which imposes the penalty*].

[*Demand for judgment.*]

1759. Complaint or affidavit by deputy game warden for violation of game law in action for forfeiture before justice of the peace (Wisconsin).[2]

[*Title.*]

[*Venue.*]

L.... M...., being duly sworn and examined by and before O.... P...., a justice of the peace in and for said county, says that he is a deputy of the state fish and game warden of said state [and makes this complaint on behalf of said state] and for complaint herein says that A.... B.... heretofore, to-wit, on the .... day of ....., 19.., at ..... county, in said state of Wisconsin, incurred a forfeiture of ..... dollars, according to the provisions of section .... of chapter .... of the laws of said state for the year 19.., by then and there offering for transportation to a common carrier and transporting unlawfully two or more packages of fish caught in the inland waters of the state of Wisconsin, to-wit, pike taken from Lake Winnebago in said state, to a point outside of the state of Wisconsin, the same being in more than twenty pound packages; and the said A....

[2] This form is sustained in State v. Nergaard, 124 Wis. 414, 102 N. W. 899, under sec. 3602 Wis. Stats. 1913. This was civil action before a justice of the peace to recover a forfeiture to the state imposed by the fish and game law of the state. The words in brackets were not in the precedent, and held to be unnecessary because the statute directly authorized the complaint to be made by a deputy warden. It was intimated however, that in case such a complaint were made by a private citizen it should appear on the face that it was made on behalf of the state.

B.... is now indebted to the State of Wisconsin in the sum of ..... dollars forfeiture for the violation of the section last designated.

WHEREFORE the complainant demands that a civil warrant be issued for the body of the said A.... B...., and that he be arrested and dealt with according to law and held to answer to the said state of Wisconsin therefor.

Dated ....., 19..

L.... M....

Subscribed and sworn to before me this .... day of ....., 19..

O.... P....,
Justice of the Peace.

1760. Allegation of a foreign statute imposing the liability sued on.

I. That by section .... of Chapter .... of the laws of the state of ..... passed ....., 19.., which chapter is entitled "An Act, etc.," it is provided as follows [*insert such provisions of the law as impose the liability sued on*].

II. That the said law has been at all times since its passage, and now is, in full force and effect, and [*if it has been construed and the fact of such construction is essential*], that the highest court of appellate jurisdiction in said state, to-wit, the ..... court, in the action of O.... P.... v. X.... Y...., brought before said court and reported in the .... volume of the reports of said state at page .... decided and still holds [*state the construction*].

III. [*Set forth the cause of action as suggested by forms in this chapter.*]

1761. Complaint by wife against saloonkeeper for damages resulting from sale of liquors to husband, an habitual drunkard (Wis. Stats. 1913 secs. 1554 and 1560).

I. That the plaintiff is, and since the .... day of ....., 19.., has been the wife of one E.... F...., and that the said E.... F.... became and was, prior to the .... day of ....., 19.., an habitual drunkard, so that by the excessive drinking of intoxicating liquors the said E.... F.... did misspend, waste, and lessen his estate so as to expose his

family to want and injure his health and endanger the personal safety and comfort of this plaintiff.

II. That from the .... day of ....., 19.., up to the time of the commencement of this action the defendant has been a saloon keeper within the town [*or* city] of ..... duly licensed under the laws of this state to keep a saloon within said town [*or* city] for the sale of strong, spiritouus, malt, ardent, or intoxicating liquors.

III. That on the .... day of ....., 19.., the supervisors of the town of ..... in said county of ..... [*or*, the aldermen of the city of .....] being the town [*or* city] wherein the said E.... F.... then resided [*or*, this plaintiff] did, by a notice in writing signed by them [*or* by her] and served upon the defendant on that day, forbid the defendant and all other persons in said town [*or* city] licensed in accordance with the laws of this state to sell or give away to said E.... F.... any ardent, spiritous, or intoxicating liquors or drinks for the space of one year from said last named date.

IV. That after the giving of such notice to the defendant, and notwithstanding the same, and on or about the .... day of ....., 19.., and at various times thereafter and prior to the expiration of one year from the giving of such notice, the defendant did knowingly sell and give away to the said E.... F.... intoxicating liquors and drinks, thereby causing the intoxication of the said E.... F...., which intoxication so caused became and was continuous [*or* very frequent] during the said last named period, whereby the said E.... F.... wasted and misspent his property and became sick and incapacitated from labor, and unable to support his family, and the plaintiff was reduced to poverty.

V. That the plaintiff was and is entirely dependent upon the said E.... F.... for her support; that the said E.... F.... was capable of earning and did earn large sums of money when not intoxicated, to-wit, about the sum of ..... dollars per week, which he applied to the support of this plaintiff; that by reason of his intoxication, so caused by the defendant, his health has been ruined, his property wasted, and he has neither earned nor contributed anything to plaintiff's support, and the personal safety and comfort of this plaintiff has been destroyed and she has been reduced

to a state of permanent sickness and ill-health, in all to her damage in the sum of ..... dollars.

[*Or:* V. That theretofore the said E.... F.... has been and was industrious and healthy, and was earning ..... dollars per month in his business as a carpenter and had provided for plaintiff and their said family a comfortable support; that upon the earnings of her said husband plaintiff was dependent for her means of support.]

VI. That in consequence of said continuous intoxication so caused by said defendant, said E.... F.... neglected this said business and failed to properly care for and provide a subsistence for plaintiff and their said family, and became frequently disabled and sick, and plaintiff was compelled to nurse and take care of him, and he became and was unable to provide a proper support for his said family, whereby the plaintiff has suffered damage in the sum of ..... dollars.

WHEREFORE plaintiff demands judgment against the defendant for the sum of ..... dollars, with the costs of this action.

1762. Complaint in the name of the state upon saloonkeeper's bond, when damages have been recovered in previous action against saloonkeeper (Wis. Stats. 1913 sec. 1549).[3]

I. That the defendant C.... D.... on or about the .... day of ....., 19.., duly made application to the town board [*or* city council] of the town [*or* city] of ..... in the county of ..... for a license to keep a saloon in said town [*or* city] for the sale of strong, spirituous, malt, ardent, or intoxicating liquors under the provisions of the statutes of the state of Wisconsin within said town [*or* city] and that upon the same day the said defendant C.... D.... as principal, and the defendants W.... X.... and Y.... Z.... as sureties, executed and filed with the clerk of said town [*or* city] their certain bond, which was approved by said town board [*or* city council], conditioned as required by sec-

[3] In Wisconsin the action for damages is to be brought against the saloonkeeper alone, and after judgment is obtained in that action, if the same be not paid, action may be brought upon the bond in the name of the state to recover the full penalty of the bond. Wis. Stats. 1913 sec. 1560 and 1549.

tion 1549 of the Statutes of said state, a copy of which bond is attached hereto, made part of this complaint, and marked Exhibit A. That thereafter, and on or about the .... day of ....., 19.., the said C.... D.... paid the license fee required by law, and the said town board granted and delivered to the said defendant C.... D.... its license in due form, licensing the said C.... D.... to keep a saloon for the sale of such liquors, at ..... in said town [*or* city] until the .... day of ....., 19.., unless sooner revoked.

II. That after the issuance of said license, as aforesaid, the said C.... D.... kept and maintained said saloon and sold spirtuous, malt, and intoxicating liquors therein during the term of said license, and that on or about the .... day of ....., 19.., one A.... B.... brought action against the said C.... D.... in the ..... court of ..... county, for damages resulting to her from the unlawful sale of intoxicating liquors by him during the term of said license, to one E... F.... in violation of the provisions of section 1554 of said Wisconsin Statutes, the said E.... F.... being a person to whom the sale of such liquors had been duly forbidden under the provisions of said last named section.

III. That such proceedings were thereafter had in said action that judgment was, on the .... day of ....., 19.., duly rendered by said court in said action in favor of said A.... B.... and against said C.... D.... for the sum of ..... dollars damages and costs, which judgment has never been paid and is in full force, unappealed from and unreversed.

WHEREFORE the plaintiff demands judgment against said defendants for the sum of ..... dollars, the penalty of said bond, and for the costs of this action.

1763. Complaint by wife against one who sold liquor to husband causing his intoxication and resulting damage to the wife (Iowa Ann. Code 1897 sec. 2418).

I. That the plaintiff is now, and ever since the .... day of ....., 19.., has been the wife of one E.... F...., and was and is dependent upon him, the said E.... F.... for her support.

II. That on or about the .... day of ....., 19.., and at various times between that date and the .... day of ....., 19.., the defendant did wilfully sell and give to the said E.... F.... intoxicating liquors, of which the said E.... F.... drank and became intoxicated, and thereby became an habitual drunkard.

III. That while so intoxicated, as aforesaid, the said E.... F.... spent his time in idleness and failed to support this plaintiff; that on the .... day of ....., 19.., while so intoxicated by intoxicating liquors so sold and furnished to him by the defendant the said E.... F.... by reason of such intoxication assaulted and beat the plaintiff and dislocated her arm, and caused her great pain and suffering in body and mind, to her damage in the sum of ..... dollars.

WHEREFORE, etc.

1764. Complaint by married woman on saloonkeeper's bond (S. Dak. C. C. P. 1908 secs. 2839–2849).[4]

I. [*Allege the procurement of a license and the giving of the bond in suit with particularity, so that it clearly appears that all the provisions of the law of South Dakota were complied with; see, by way of example, the first allegation in Form 1762.*]

II. [*Allege the relationship of the plaintiff to the person to whom liquor was unlawfully sold, as in Form 1761.*]

III. [*If the liquors were sold to a forbidden person, allege the giving of the notice substantially as in Form 1761, with such changes as are necessary to conform to S. Dak. C. C. P. 1908, sec. 2839.*]

IV. [*Allege damages, and demand judgment, as in Form 1761.*]

1765. Complaint by minors on bonds of several saloonkeepers (Neb. R. S. 1913 secs. 3849–3859)[5]

I. [*Allege infancy of plaintiff and appointment of a guardian ad litem or next friend, as in Form 863.*]

[4] It is held in South Dakota that this action may be maintained by a divorced wife, for damages accruing to herself and children before the divorce. Nordin v. Kjos, 13 S. Dak. 497; 83 N. W. 573. See that case for allegations of a complaint by divorced wife which was there sustained.

[5] Adapted from complaint in the

II. [*Allege giving of bonds by the various defendants, and issuance of licenses according to the laws of Nebraska, in detail; see, for example, the first allegation in Form 1762.*]

III. That each of the said defendants on or about the .... day of ....., 19.., and at numerous times between that time and the date of the commencement of this action, and during the continuance of their said licenses, did sell and give to one E.... F.... the father of these plaintiffs, malt, spirituous, and vinous liquors in large quantities, and that the said E.... F.... drank the said liquors so sold and given to him, and thereby and by the excessive use of said liquors became an habitual drunkard.

IV. That the said plaintiffs had at the times aforesaid and still have no means of support except the support furnished them by their said father; that prior to the year 19.. the said E.... F.... was temperate and industrious, and supported these plaintiffs by means of his earnings as a carpenter, but that by reason of the furnishing of said liquors, as aforesaid, the said E.... F.... neglected his business, spent his time in idleness, and ceased to earn any wages, and became an habitual drunkard, and failed entirely to support these plaintiffs, whereby the plaintiffs suffered damage in the sum of ..... dollars.

WHEREFORE [*demand judgment*].

1766. Complaint for damages against a witness for disobeying a subpoena.[6]

I. That on the .... day of ....., 19.., at ..... the plaintiff caused the defendant to be duly served with a subpoena commanding him to attend as a witness in the .....

case of Bloedel v. Zimmerman, et al., 41 Nebr. 699; 60 N. W. 6, where the right of minor children to maintain the action for loss of support was maintained.

[6] Civil damages may be recovered of a material witness who, when duly supoenaed and his fees paid or tendered, wilfully fails to attend. Wis. Stats. 1913 sec. 4063; Ariz. R. S. 1913 sec. 1685; Kans. Gen. Stats. 1909 sec. 5924; Minn. Gen. Stats. 1913 sec. 8372; Mo. R. S. 1909 sec. 6371; Neb. R. S. 1913 sec. 8415; S. Dak. C. C. P. 1908 sec. 495; Okla. Comp. Laws 1909 sec. 5851; Wash. Rem. and Bal. Code 1910 sec. 1220; Wyo. Comp. Stats. 1910 sec. 4551. In North Dakota a witness subpoenaed by defendant in a criminal action is liable in a civil action in the sum of fifty dollars, unless he shows good cause for his non-attendance. N. Dak. Rev. Codes 1905 sec. 10180. In such action the foregoing form may be susbstantially used, substituting for the allegations of damage the statement

court, in and for the county of ..... [*or*, to attend as a witness before M.... N...., an officer of the ..... court, duly empowered to receive evidence, *or*, to attend as a witness before M.... N...., a commissioner appointed by the ..... court, to take testimony, *or*, to attend as a witness before M.... N...., a referee duly appointed by the ..... court, to [*briefly designating object of reference*], on the .... day of ....., 19.., there to give testimony in behalf of the plaintiff in proceedings there pending, wherein this plaintiff was plaintiff, and one O.... P.... was defendant [*or otherwise briefly designate the proceedings*] and that the said defendant was a material witness upon the issues raised in said action [*or* proceedings].

II. That at the same time the plaintiff caused .... cents, the lawful fees of the said witness for one day's attendance and his mileage, to-wit, the sum of .... cents to be paid [*or* tendered] to him.

III. That the defendant, not regarding his duty, and without reasonable or sufficient excuse, failed and wilfully refused to attend as commanded.

IV. That thereby the plaintiff, when said action was called for trial, was compelled, for want of the testimony of said defendant, without whose testimony he could not safely proceed to the trial of said action, to move the said court there to postpone [*or* continue] the said action; and the said court did postpone [*or* continue] the same, at the cost of the said plaintiff; and the plaintiff was compelled to pay on said postponement [*or*, continuance], as costs thereof

that by reason of such disobedience of the subpoena the defendant became indebted to the plaintiff, according to the provisions of sec. 10180 of the Revised Codes of North Dakota, in the sum of fifty dollars. The statutes of several of the states covered by this work provide, in addition to the recovery of damages sustained by a party because of the failure of a witness to attend, that the party aggrieved may recover a stipulated forfeiture in the same civil action. These states and the statutory forfeitures are as follows: Cal. C. C. P. 1906 sec. 1992 ($100); Idaho Rev. Codes 1908 sec. 6042 ($100); Iowa Ann. Code 1897 sec. 4664 ($50); Mont. Rev. Codes 1907 sec. 7981 ($100); Oregon Laws 1910 sec. 821 ($150); Utah Comp. Laws 1907 sec. 3424 ($100). In Arkansas (Ark. Dig. of Stats. 1904 sec. 3122) the court may summarily order the defaulting witness to pay to the party on whose behalf he was summoned the costs occasioned to the party by the disobedience of the supboena, not exceeding $20, besides being liable for any damages occasioned by the failure to attend.

..... dollars, which sum he was so compelled to pay by reason of the said refusal of the said defendant; to the plaintiff's damage ..... dollars.

[*Or:* IV. That the plaintiff, when said action was called for trial, was nonsuited for want of the testimony of the defendant, and his action was dismissed, with costs, *or otherwise state the substance of the judgment of nonsuit*, and the plaintiff was compelled to pay the same, and the sum of ..... dollars, his costs, counsel-fees, and disbursements in the said action; and that the defendant in said action having become insolvent (*or*, the demand upon which said action was brought having meanwhile become barred by the statute of limitations), the plaintiff lost his demand, to recover which said action was brought, all which was caused by said refusal of the defendant; to the plaintiff's damage ..... dollars.]

WHEREFORE [*demand judgment*].

1767. Complaint to recover a forfeiture for violation of a city ordinance.

I. That the plaintiff is and was at the times hereinafter mentioned a municipal corporation organized and existing under the laws of the state of .....

II. That heretofore, and on or about the .... day of ....., 19.., the common council of the plaintiff city regularly passed an ordinance entitled "[*set forth title*]," which said ordinance, among other provisions, provides as follows [*set forth those sections of the ordinance as cover offense charged*] [*or*, a copy of which ordinance is attached to this complaint, made part thereof, and marked Exhibit A]; that thereafter and on or about the .... day of ....., 19.., said ordinance was duly approved by the mayor of said city, and was on the .... day of ....., 19.., duly published in the official paper of said city.

III. That thereafter, and on or about the .... day of ....., 19.., the defendant did, contrary to and in violation of the ordinance aforesaid [*set forth the defendant's violation of the ordinance*].

IV. That by reason of the premises, defendant has become indebted to the plaintiff in the sum of ..... dollars.

WHEREFORE, etc.

1768. Complaint against a railroad corporation for exacting an illegal rate of fare.[7]

I. That the defendant is now and was at the times hereinafter named, a domestic railroad corporation organized and existing under the laws of this state, and maintaining and operating a line of railroad between the city of ..... and the city of ..... in said state and elsewhere.

II. That on and prior to the .... day of ....., 19.., the gross receipts of the defendant corporation resulting from the operation of its said railroad exceeded the sum of three thousand five hundred dollars per mile per annum, and the said defendant was not entitled to demand, collect or receive a greater compensation for the transportation of persons over its said railroad line than three cents per mile.

III. That the distance between said cities of ..... and ..... upon defendant's said railroad line is ..... miles and no more, and defendant is entitled to demand and receive from each passenger, for transportation between said cities the sum of ..... dollars and no more.

IV. That on or about the date above mentioned the plaintiff applied at defendant's ticket office at said ..... to purchase a ticket entitling him to passage between said ..... and ....., and was ready and willing, and offered to pay for the same the sum of ..... dollars, but defendant's agent refused to sell said ticket for said sum, but wilfully demanded and received of plaintiff the sum of ..... dollars for said ticket, and plaintiff was compelled to pay said sum, whereby defendant demanded and received from plaintiff .... cents in excess of the lawful rate of fares as aforesaid.

V. That by reason of the premises the plaintiff has been actually damaged in the sum of ..... dollars.

[7] This form was inserted in the first edition of the work to meet sec. 1768 Stats. Wis. 1898 which provided for the recovery of treble damages in case of discontinuation or unreasonable overcharge by a railroad company in the carriage of passengers or freight. This section was repealed in 1913. It is quite doubtful whether section 1797-25 Stats Wis. 1913, providing for the recovery of treble damages in case of the violation of any section of the railway commission act, (chapter 362 Laws 1905.) applies to the case of an overcharge in the passenger rate now fixed by sec. 1798a Stats. Wis. 1913, and the form is preserved here as suggestive of the general form of a complaint to enforce a statutory liability, and not as indicating an opinion that the action still exists.

WHEREFORE the plaintiff demands judgment against the defendant for the sum of ..... dollars [*three times the actual damage*] besides the costs of this action.

1769. Complaint by state against member of board of review to recover forfeiture for intentional omission of property from tax roll (sustained in State v. Zillman, 121 Wis. 472; 98 N. W. 543).

The above named plaintiff, by A.... B...., district attorney of ..... county, complains of the above named defendant, and for cause of action alleges:

I. That the defendant is indebted to the plaintiff in the sum of two hundred and fifty dollars, in accordance with the provisions of section five of chapter three hundred and seventy-nine laws of the state of Wisconsin, passed in the year 1901, entitled, "An act providing for the punishment of assessors and tax payers for asking, accepting, soliciting or giving bribes, favors or rewards in the matter of the assessment or valuation of property, imposing forfeitures for violations of the law by assessors or boards of review and declaring contracts void, made to influence the valuation of property for taxation," and that the particular offense and delinquency for which this action is brought is that the said E.... F...., defendant, was at the time hereinafter mentioned, a member of the board of review for the assessment district of the village of ..... in said county, by virtue of the said defendant being then and there the president of said village of .....

II. That on the .... day of ....., in the year 19.., the defendant herein named, and G.... H....., village clerk, and J.... K...., assessor of said village of ....., each being members of said board of review by virtue of being respectively clerk and assessor of said village of ....., did meet and organize and act as a board of review in and for the assessment district comprising the said village of ....., and the aforesaid J.... K...., the assessor of said assessment district comprising the said village of ....., and the aforesaid J.... K...., the assessor of said assessment district, comprising the village of ..... aforesaid, did then and there lay before said board of review his assessment roll of

real property, and all the sworn statements made by others and valuations made by him, the said assessor, of personal property and bank stock.

III. That the said defendant as member of said board of review in said assessment district did then and there intentionally omit, and did then and there intentionally agree with the said G.... H...., village clerk, as member of said board of review, to omit from assessment a large amount of personal property, amounting in value, as appeared from said sworn statements and assessment roll of said assessor, the sum of ..... dollars, all of which property was then and there liable to taxation in said assessment district, comprising the said village of .....

WHEREFORE the plaintiff demands judgment against the defendant for the sum of two hundred and fifty dollars, and the costs of this action.

A.... B....
District Attorney for
..... County.

[*Verification.*]

1770. Outline of complaint on saloonkeeper's bond (Minnesota).

I. [*Allege that the defendant kept a saloon for the sale of intoxicating liquors under a license issued to him by the city council of the city in question, giving the date of the license.*]

II. [*Allege that in order to procure said license the defendant saloonkeeper as principal, and the other defendants as sureties, executed and filed a bond, giving the date of the bond and a copy of it, and that such bond was duly accepted by the council of the city and the license issued thereon.*]

III. [*Allege the facts upon which the cause of action arises, as, for instance, that the defendant saloonkeeper unlawfully kept his saloon open and sold intoxicating liquors to men who were habitual drunkards, whereby they became so intoxicated that one of them drew a revolver and shot the plaintiff's husband, or otherwise state the facts upon which the cause of action is based.*]

IV. [*Allege that said husband left surviving him the plaintiff, his wife, and their children, naming them and giving their ages.*]

V. [*That upon the .... day of ....., 19.., E.... F....., a court commissioner, duly made an order authorizing the plaintiff to maintain this action on said bond.*]

VI. [*That by reason of the premises the defendants are indebted to the plaintiff in the sum of ..... dollars, no part of which has been paid, although demanded.*]

WHEREFORE, etc.

CHAPTER LXXXII.

MISCELLANEOUS COMPLAINTS.

1771. By son of deceased person, for malicious mutilation of corpse.

1772. Complaint by guardian of insane wife against mother-in-law and others for conspiracy to alienate the affections of husband and deprive her of support, the husband being joined as a defendant.

1773. Complaint by trustee of the title of real estate interpleading rival claimants and their creditors, and praying for determination of their rights.

1774. Complaint by tenant against landlord and another tenant for negligently overloading upper floors of a building causing collapse of building.

1775. Complaint by owner of livestock shipped in another's name against commission merchant, for proceeds of sale.

1776. Complaint for personal injuries from defendant's negligence, and to set aside release obtained by fraud.

1777. Complaint for conspiracy by several, to procure an unlawful abortion upon the plaintiff, and the accomplishment thereof.

1778. Complaint under Wis. stats. to recover treble the amount of usurious interest paid upon a loan of money.

1779. Complaint by several riparian owners, jointly, to restrain an upper owner from wrongfully diverting water from plaintiff's lands.

1780. Complaint in equity for a continuing trespass caused by building, and maintaining a stone foundation wall on plaintiff's lot.

1781. Complaint against surety company, upon an undertaking given to release garnishment, and pay judgment under Wis. stats.

1782. Complaint by creditor of deceased person to reach lands purchased by deceased, and conveyed to another, and subject them to a trust in favor of creditors, under Wis. stats.

1783. Complaint to enjoin use of trademark and label, and to recover damages.

1784. Complaint by grantee of real estate, whose deed was unrecorded, against grantor for conveying same to an innocent purchaser.

1785. Complaint for maliciously filing *lis pendens* and preventing sale of plaintiff's land.

1786. Outline of complaint by chattel mortgagee as intervener in an action by the mortgagor against wrongdoer for destruction of the mortgaged property.

1787. Outline of complaint for

damages on account of change of street grade.
1788. Complaint by surety to compel principal to pay the debt for which surety is bound. (Minnesota.)
1789. Outline of complaint for injury to business from sale of impure food.
1790. Outline of complaint against sheriff and purchaser on execution to set aside levy upon plaintiff's homestead.
1791. Outline of complaint for refusal to transfer corporate stock on books.
1792. To compel issuance of corporate stock certificate.
1793. Outline of complaint to enjoin city from issuing municipal bonds because of illegality.
1794. For redelivery of pledge and an injunction against its sale or transfer. (Connecticut Pr. Act.)
1795. Outline of complaint by corporation against its own director for neglect of duty.
1796. Statutory action to determine boundary lines.
1797. Outline of complaint by executor for construction of will.
1798. By stockholder against business corporations and its directors for misconduct of directors.
1799. Complaint by receiver of foreign mutual insurance company to recover an assessment on premium note.
1800. Complaint under milldam act by landowner whose lands are flowed. (Wisconsin.)
1801. Complaint in action to condemn land for public use by municipal corporation.
1802. The same, by railroad corporation.
1803. To enjoin members of a labor union from conspiracy to boycott and from picketing.
1804. By riparian owner of lands in various counties to restrain diversion of waters of a river flowing through the lands, and to recover damages for past diversions.
1805. To restrain diversion of surface and percolating waters resulting in damage to plaintiff's orchard.
1806. To establish right to the use of pipe line for irrigating purposes across defendant's land and enjoin interference therewith.
1807. Complaint in equity by owner of land to restrain defendants from damming a river, digging irrigating ditches and trespassing on plaintiff's lands.
1808. Complaint by married woman as a sole trader.
1809. Complaint in action agains married woman as sole trader.
1810. By pledgor of goods, to obtain an accounting and for an injunction restraining their sale.
1811. For forcible entry and unlawful detainer.
1812. For forcible detainer. (California.)
1813. For unlawful detainer. (California.)
1814. Complaint in unlawful detainer. (Arkansas.)
1815. Complaint by receiver of insolvent corporation to recover assessment on the

stock against one who transferred his stock to an insolvent third person.

1816. Complaint by assignee in bankruptcy of insolvent corporation against a stockholder who has withdrawn, to recover the amount received from the corporation on such withdrawal.

1817. Complaint by corporation employer to set aside award of industrial commission under workmen's compensation act. (Wisconsin.)

1818. The same.

1819. The same, by municipal corporation.

1820. Complaint against principal and agent for relief against one or the other in the alternative. (Wisconsin.)

1771. By son of deceased person, for malicious mutilation of corpse (precedent sustained in Koerber v. Patek, 123 Wis. 453; 102 N. W. 40).

The above named plaintiff, by O.... P...., his attorney, complains of the defendant, and for cause of action alleges:

I. That on or about the .... day of ....., 19.., E.... F...., mother of plaintiff, died at ....., in the city of ...., county of ....., state of .....

II. That plaintiff is the son and heir of said E.... F...., deceased, and was, shortly before the death of said E.... F...., instructed, requested, authorized and charged by said E.... F.... to take charge of her body after her death and see to it that her said body after death be decently and properly buried; that plaintiff is the only person that has had any interest in the said remains of said deceased.

III. That upon the death of said E.... F...., the exclusive legal right and duty of protecting, caring for, and giving and providing a decent and respectable burial to and for, the said dead body of the said E.... F.... devolved upon this plaintiff.

IV. That upon the death of said E.... F...., plaintiff, in the exercise of his right and duty, took charge of the said dead body of the said E.... F.... and caused the same to be removed from the said hospital to the residence of plaintiff at ..... street, in the said city of ....., and plaintiff then and there took charge of said dead body and duly attended to having the same properly prepared for burial.

V. That thereafter, to-wit, on or about the ..... day of ....., 19.., and while said dead body was in the possession, care and custody of plaintiff, the defendant came to plaintiff's

said residence and requested of plaintiff the permission to merely examine the stomach of said dead body, which said request the plaintiff granted the defendant, but that defendant did then and there, wilfully, maliciously, fraudulently, without the authority and against the wish of plaintiff, and in violation and disregard thereof, without any authority of law, and trespassing upon the rights of plaintiff as custodian of said dead body and as son and heir aforesaid, and outraging said dead body and also the plaintiff, and against, as well, the good morals and peace of the community, with sharp instruments cut out, remove from said dead body, and carry away, the stomach of said dead body, and defendant has ever since refused and neglected to return said stomach, and consequently plaintiff was obliged to and did bury said dead body of his said mother on or about the .... day of ....., 19.., without, and separate and apart, from the said stomach.

VI. That after the removal of said stomach by defendant from said dead body as aforesaid, and before the burial of said body as aforesaid, plaintiff expressly requested, demanded and implored the defendant to replace said stomach in its proper place in said dead body, but that defendant always refused and neglected so to do.

VII. That by reason of the acts of the defendant aforesaid, the rights of plaintiff, who was a loving and devoted son of said E.... F...., have been recklessly and wilfully disregarded and trespassed upon, and plaintiff's feelings severely and greatly injured, and the devotion, love and respect that plaintiff entertained for his dead mother have been shocked and wounded, and the plaintiff has suffered greatly therefrom, both in mind and body, to his damage, to-wit, in the sum of ..... dollars.

WHEREFORE plaintiff demands judgment against the defendant for the said sum of ..... dollars, together with the costs and disbursements incurred in and about this action.

O.... P...., Plaintiff's Attorney.

1772. Complaint by guardian of insane wife against mother-in-law and others for conspiracy to alienate the affections of husband and deprive her of support, the husband being joined as a defendant (adapted from complaint sustained in Randall v. Lonstorf, 126 Wis. 147; 105 N. W. 663; see note to form 1395).

Now comes the plaintiff above named, by O.... P...., his attorney, and complaining of the defendants, respectfully shows to the court as follows:

I. That the plaintiff is and for many years last past has been, a resident of the state of ..... and was, upon due and proper proceedings had in the county court of ..... county, and on the .... day of ....., 19.., duly appointed the guardian of the person and property of one L.... M.... theretofore in said county court duly adjudged an insane person. That this plaintiff duly qualified as such guardian and ever since said ....., 19.., has been and still is such guardian.

II. Plaintiff further shows that the aforesaid L.... M.... was born and always lived in the city of .....; that the said L.... M...., prior to the marriage hereinafter set forth was named L.... A...., and after attending the public schools of said city of ....., was employed in a retail store in said city of ..... and earned her livelihood thereby.

III. That for a number of years prior to ....., 19.., the said L.... M.... was courted by O.... M...., one of the defendants named herein; and that thereafter, to-wit, on the .... day of ....., 19.., at the city of ....., in the state of ....., the said L.... M...., then L.... A...., intermarried with the said O.... M.... and that said marriage was solemnized in the presence of a married sister of the said O.... M...., and her husband, who were then living in said city of .....; that the said O.... M...., and said L.... M.... ever since have been and still are husband and wife, and that ever since the said marriage the real home and residence of said O.... M.... and of said L.... M.... has been the said city of .....

IV. That during the first years of the married life of said L.... M.... and O.... M.... and until the carrying out of the conspiracy, confederacy and agreement hereinafter re-

cited between the defendants, the said L.... M.... and the said O.... M.... lived happily and pleasantly together and that for about two years they lived together at the home of the parents of the said L.... M.... and were for a time partially supported and taken care of by said parents.

V. That the defendants C.... M...., D.... M.... and E.... M...., are adult children of the defendant H.... M...., and are entirely dependent upon her for their support and maintenance and always have been so, and all reside with the said defendant H.... M.... in the said city of .....

VI. That the defendant O.... M.... is also a son of the defendant H.... M...., and the husband of L.... M...., as hereinbefore recited and is a man of weak and irresolute character without any settled occupation or position and, as plaintiff is informed and verily believes at all times since his marriage to said L.... M.... has been and still is of sufficient ability to maintain himself and his wife L.... M.... and to earn the means with which to support her, yet he has been for years last past and still is to a great extent dependent for all that he eats, drinks and wears and for his support, upon the bounty of his mother, the defendant H.... M...., and small sums advanced to him at various times by the defendant H.... M.... or other members of the defendant family; and that although at times said defendant O.... M.... does obtain and have considerable property through his spasmodic, but rare, attacks of labor or from speculation, or gift, it is soon dissipated on said defendant O.... M...., or others other than the said L.... M....

VII. That H.... M.... is the widow of one N.... M...., and is a woman of great wealth, and now lives and for many years last past has lived in great luxury and frequently travels in Europe and over the United States and with certain others of the defendants herein as more fully appears hereinafter; that she is a woman of imperious will and disposition and has almost complete control over the other defendants herein and keeps them in practically complete subjection to her will, wishes and whims, and that the property of said H.... M.... is of such a great amount that the individual shares of the children of said H....

M.... upon the decease of said H.... M.... will amount to the neighborhood of ..... dollars each at least.

VIII. Plaintiff further alleges upon information and belief, that the defendants, other than O.... M...., and particularly the defendant H.... M.... were opposed to the intermarriage of said defendant O.... M.... with the aforesaid L.... M.... at the time thereof, on the grounds, as plaintiff is informed and verily believes, that the station in life of the said L.... M.... was not of the exalted position that the defendants arrogate to themselves and that the family from which said L.... M.... descended were not blessed with any considerable amount of worldly goods and not members of the same select circle in which the defendants herein fondly believe they are enshrined.

IX. Plaintiff further alleges upon information and belief, that shortly after the intermarriage of the defendant O.... M.... with L.... M.... as aforesaid, the other defendants herein maliciously, wickedly and fraudulently conspired and agreed together and for the purpose of separating the defendant O.... M.... from the said L.... M.... so as to deprive the said L.... M.... of the support and assistance of the said O.... M.... and to alienate and destroy the affection of the defendant O.... M.... towards the said L.... M...., and to prevent and interfere with the said O.... M.... providing the said L.... M.... with the necessaries of life and further for the purpose of influencing the said O.... M.... to remain without the state of ..... and beyond the jurisdiction of its courts and to keep and maintain the said O.... M.... so without the state of ..... and beyond the jurisdiction of its courts that service of process issuing out of any of the courts of the said state of ..... upon said O.... M.... upon behalf of said L.... M.... might be prevented and rendered of no force and effect and to prevent and to avoid any action being commenced by the said L.... M...., or the obtaining of any decree or judgment of any court, civil or criminal, to compel the said O.... M.... to support and maintain the said L.... M.... under any of the statutes of the state of ....., whether civil for a divorce suit or criminal for the unlawful desertion and abandoning of the said L.... M.... by O.... M.... or to prevent the said L.... M.... from obtaining any relief, support or maintenance from the said O.... M....

X. Plaintiff further alleges upon information and belief, that the said defendants for the carrying out of said conspiracy, caused and procured the discharge of the said O.... M.... from various places in which he was employed during the time he lived wih the said L.... M.... for the express purpose of preventing him from supporting the said L.... M.... and to keep her as aforesaid in poverty and destitution and repeatedly, falsely and fraudulently stated to said O.... M.... for the further carrying out of the conspiracy aforesaid, that the said L.... M.... was untrue and unfaithful to him, the said O.... M....

XI. Plaintiff further alleges upon information and belief, that to further carry out the purpose, agreement, conspiracy and confederacy of the said defendant, the defendants have repeatedly urged the said O.... M.... to desert and leave the said L.... M...., his lawful wife, as aforesaid, and to go beyond the state of ..... and have provided the said O.... M.... with large sums of money to so go without the state of ..... and remain therefrom, and certain of the defendants herein have taken said O.... M.... upon a trip to Europe and furnished large and lavishly for his expenses on the same for the express purpose of carrying out the end and object of said conspiracy aforesaid; and have so influenced the said O.... M.... by said means and by threats that the defendant H.... M.... would disinherit said O.... M.... and would so arrange her last will and testament that said O.... M.... would be given no part or parcel of her vast wealth and estate, that said O.... M.... has finally joined the other defendants named herein in their nefarious and unholy scheme and confederacy aforesaid.

XII. Plaintiff further alleges upon information and belief that subsequent to the appointment of the plaintiff, guardian of said L.... M.... as aforesaid, the said defendants have continued in the aforesaid unlawful, wicked and malicious conspiracy and confederacy to keep and maintain the said O.... M.... without the state of ..... as aforesaid and beyond the jurisdiction of its courts, both civil and criminal, and to keep and maintain the said L.... M.... in poverty and destitution and to force her, if possible, to consent and to allow of a judgment of divorce to be obtained by the said defendant O.... M.... in some other jurisdiction than that of the state of ..... where it would be

impossible on account of the poverty and condition of the said L.... M.... to appear or to protect her rights or obtain any relief whatever as against said O.... M....

XIII. Plaintiff further alleges upon information and belief, that for the further carrying out of said conspiracy, the said O.... M.... commenced several divorce suits without the state of .....; one in the state of ..... against the said L.... M...., which was dropped by said defendant O.... M...., and thereafter and since the commitment of the said L.... M.... as aforesaid to the ..... county hospital for the insane, and the adjudication of her as an insane person as aforesaid, commenced a divorce suit in the ..... court of the state of ..... for ..... county, in which the complaint therein is verified by the said O.... M...., on or about ....., 19.., and based upon false and untrue allegations and containing no statement of the fact, then, as plaintiff is informed and verily believes, well known to said defendant O.... M...., of the commitment of said L.... M.... and of her insane condition, nor of the appointment of this plaintiff as guardian aforesaid, and plaintiff verily believes that the same was for the purpose of imposing upon and deceiving said court. That the other defendants herein with knowledge thereof have assisted and are assisting the said O.... M.... with aid, money and advice in carrying on and continuing said false and fraudulent attempt at divorce in the said state of ....., all for the purposes aforesaid.

XIV. That the said L.... M.... has now and for the two or more years last past has had a good and valid action for divorce against said defendant O.... M.... for the wilful desertion of said L.... M.... by said O.... M.... for a term of more than one year, and for a further cause, the cruel and inhuman treatment of said L.... M.... by said O.... M.... and for a further cause that the said defendant O.... M...., being of sufficient ability, has and does refuse and neglect to provide for said L.... M...., and for a further cause that the conduct of said defendant O.... M.... towards said L.... M.... is and has been such as may render it unsafe and improper for her to live with him.

XV. That the said L.... M.... is without means or property whatsoever of her own and that there are no means

belonging to said L.... M.... coming to this plaintiff as guardian of L.... M.... sufficient to pay even the ..... dollars per week board and the ..... dollars a year for clothing required of the patients confined and kept in said ..... county hospital for insane and that said L.... M.... has been since her commitment and still is a charge upon ..... county and required to be supported and cared for by said county as other paupers are. That the conspiracy and agreement aforesaid between the defendants and the carrying out of the same has beggared the said L.... M...., deprived her of her support, alienated the affections of her said husband, unseated her intellect, and has deprived her and this plaintiff, as her guardian aforesaid, of all the rights hereinbefore specified, existing in favor of said L.... M.... and this guardian as against the said O.... M...., all to the plaintiff's damage in the sum of ..... dollars.

WHEREFORE plaintiff demands judgment against the said defendants in the sum of ..... dollars, together with his costs and disbursements.

O.... P....
Plaintiff's Attorney.

[*Verification.*]

1773. Complaint by trustee of the title of real estate interpleading rival claimants and their creditors, and praying for determination of their rights (precedent in Winn v. Itzel, 125 Wis. 19; 103 N. W. 220).

And now comes the said plaintiff and pursuant to the order and direction of the court, for a supplemental and amended complaint in this action, respectfully shows unto said court:

I. That on and prior to the .... day of ....., 19.., one L.... M.... was the owner in fee simple and in possession of the following described land in the fourth ward of the city of ....., viz. [*give description*]. That on that day the said L.... M.... made, executed and delivered to this plaintiff a deed in trust of said premises, upon certain trusts, one of said trusts being to convey the same to such persons as the said L.... M.... should by instrument in writing or by will appoint, a copy of which is hereto attached, marked "Exhibit A." That upon the execution of said deed this plaintiff

entered into possession of said property and has since remained, and is now, in possession thereof.

II. This plaintiff further shows that on or about the .... day of ....., 19.., the said L.... M...., who was then a resident of the city of ..... in the said county, departed this life testate. That thereafter, and on the .... day of ....., 19.., due proceedings in that behalf having been first duly had, the last will and testament of the said L.... M.... and the codicil thereto were duly admitted to probate by the county court of ..... county. That copies of such will and codicil are hereto annexed marked "Exhibit B" and "Exhibit C," and made a part hereof. That the said X.... and Y.... mentioned in said will having filed in said court their refusal to serve as executors, this plaintiff was appointed by said court executor of said will, and thereupon this plaintiff took the oath and duly qualified as such executor, and letters testamentary were duly issued to him out of and under the seal of said court as sole executor of and under said will.

III. This plaintiff further shows that on the .... day of ....., 19.., the said defendant C.... D.... filed for record in the office of the register of deeds of ..... county a deed purporting to have been executed by the said L.... M.... on the .... day of ....., 19.., and that said deed was thereupon duly recorded by the register of deeds on said day in his said office, in volume .... of deeds on pages .... and ....

IV. And this plaintiff further shows that the said C.... D.... claims that the said deed was duly executed and delivered to her by the said L.... M.... on the day the same bears date, and that the same amounts to an execution by the said L.... M.... of the power reserved in said deed to appoint the person to whom this plaintiff shall convey the said lot nine. That the said C.... D.... claims under and by virtue of said deed to be the owner of said lot nine.

V. This plaintiff further shows that the said defendants V.... and W.... on the other hand insist and claim that at the time of the execution and delivery of the said pretended deed of which a copy is hereto annexed, marked "Exhibit D" the said L.... M.... was of unsound mind and mentally incapacitated from making that or any deed or contract or appointment, and that the same was procured by means of

the fraud of the said C.... D.... and the exercise of her undue influence upon the said L.... M...., and the said defendants V.... and W.... demand of this plaintiff that he ignore and treat as a nullity the said pretended deed of the said L.... M.... to the said defendant C.... D...., and that he convey said lot nine to them under and pursuant to the terms of the said last will and testament of the said L.... M....

VI. And this plaintiff further shows unto the court that on the .... day of ....., 19.., a judgment was docketed in the ..... court of said county against the said defendant C.... D.... for ..... dollars, in favor of one G.... H.... and that on the .... day of ....., 19.., a judgment was docketed in said ..... court in favor of the said defendant E.... F.... for the sum of ..... dollars against the said defendant C.... D...., and that both of said judgments remain of record unsatisfied in the office of the clerk of the said court. That the said plaintiff is informed and verily believes that the said defendants G.... H.... and E.... F.... claim the said judgments to be valid and subsisting liens against the said premises.

That this plaintiff is in doubt as to his duty in the premises, and therefore prays this court to determine the question of validity or invalidity of the said deed to the said C.... D...., and by its judgment herein to determine the rights of the parties and give to him proper direction in the premises and for such other and further relief as shall be just and according to equity.

1774. Complaint by tenant against landlord and another tenant for negligently overloading upper floors of a building, causing collapse of building (sustained in B. B. C. Co. v. Rees, et al., 69 Wis. 442; 34 N. W. 732).

I. That as plaintiff is informed and believes, the said defendant C.... D.... was on said .... day of ....., 19.., ever since has been, and now is, the owner of a brick block known as .... Block, and situated on .... street in the fourth ward of said city; that said block is four stories high above the basement, and is divided into several stores by partition walls; that said stores are rented by said de-

fendant C.... D.... to tenants; that the north store of said block is known as No. ...., ... street, and the store in said block next adjoining on the south is known as No. .... of said .....street.

II. That as plaintiff is informed and believes, prior to the said .... day of ....., 19.., the said defendant C.... D.... and said defendant E.... F.... entered into negotiations for the purpose of leasing from said defendant C.... D.... to said defendant E.... F.... the store known as No. ...., ... street, and the fourth floor of said store No. ...., ... street; that said defendant E.... F.... then and there notified and informed said defendant C.... D.... that the purpose for which they wished to lease and use said store No. .... and said fourth floor of said store No. .... was as a shop and warerooms for the manufacture, storing and selling of stoves, wire, iron and other articles of great weight; that they desired especially to use said fourth floor of said store No. .... for storing thereon iron, wire, stoves and other articles of great weight, and that they needed for that purpose a strongly built building; that said defendant C.... D.... then and there stated and represented to said defendant E.... F.... that said stores were strongly built and the floors thereof capable of sustaining great weight, and fit for the purposes for which the said defendant E.... F.... desired to use the same as aforesaid; that said fourth floor of said store No. ..... would sustain, and that he, said E.... F.... could safely store and place thereon weight to the amount of two hundred pounds to each square foot of said floor; that thereupon the said defendant E.... F...., relying upon said statements and representations of said defendant C.... D...., then and there agreed to lease said premises from said defendant C.... D...., and that pursuant thereto the latter did on or about the .... day of ....., 19.., lease, demise, and let said store No. .... and said fourth floor of said store No. .... to the defendant E.... F.... as a shop and warerooms for the manufacture, storage and sale of stoves, iron and other articles as above stated for the term of five years from ....., 19.., said lessees yielding and paying therefor to said defendant C.... D.... the annual rent of ..... dollars.

III. That thereupon, and on or about the .... day of ....., 19.., the said defendant E.... F.... went into possession of said store No. .... and said fourth floor of said store No. ...., using the same for the purposes aforesaid under said lease, and continued to occupy the same and paid rent therefor to said defendant C.... D.... as above stated, up to and including the time that said fourth floor broke down and fell, as hereinafter stated.

IV. That it was understood and intended at the time that said premises were leased as aforesaid on the part of said defendant that the same were to be used for the purposes aforesaid, but this plaintiff avers that said premises, and especially said fourth floor of said store No. .... was at the time said lease was made, and ever since has been unfit for the purposes for which they were leased as aforesaid; that said floor of said fourth story was not strongly built, and was unfit for storing stoves, iron, hardware and other articles of great weight; that it could not sustain, and that it was not safe to place thereon weight to even the amount of one hundred pounds to the square foot; that said representations and statements of said defendant C.... D.... were false and untrue, as said defendant C.... D.... knew, or had reason to know.

V. And this plaintiff further shows that on or about the .... day of ....., 19.., the said defendant C.... D.... leased, demised and let to this plaintiff the first and second stories of said store No. ...., ... street, as and for a shop and warerooms for the manufacture and sale of billiard tables and other merchandise, for the term of five years from ....., 19.., at and for the agreed rent of ..... dollars a year for the first two years, and ..... dollars a year for the last three years; that on or about said .... day of ....., 19.., this plaintiff went into occupation of said first and second stories of said store No. .... under said lease, using the same for the purposes aforesaid, and yielding and paying to said defendant C.... D.... said rent until the falling of said fourth floor as hereinafter stated. That on or about the .... day of ....., 19.., the said defendant E..... F....., relying upon the representations of said defendant C.... D...., that said floor was fit and strong to carry a weight of two hundred pounds to the square foot, and using said fourth floor of said store No. .... for storage

as aforesaid, carelessly and negligently placed and stored thereon a great amount of iron, wire and other articles of great weight of a like character, weighing in all about ninety-eight thousand pounds; that such iron, wire, and other articles were stored and placed on said floor in a space about thirty feet long and nineteen feet six inches wide, making a burden of about one hundred and sixty-seven pounds to the square foot on said floor, which was a much greater weight than is ordinarily put upon the fourth floor of a store, and more than he, the said defendant E.... F...., would have stored on said floor had he not been so misinformed as to its strength by said defendant C.... D.... That thereupon and on said .... day of ....., 19.., by reason of such great weight of iron, wire and other articles placed thereon as aforesaid, and by reason of said floor being unfit for the purposes for which it was leased and used as aforesaid, the said floor gave way and both said floor and said iron, wire and other articles stored thereon broke down and through the remaining floors of said store, including the floors occupied by this plaintiff as aforesaid, and fell into the basement of said building; that thereby and by reason of the fault and negligence of said defendants C.... D.... in leasing for storage as aforesaid said premises, and by reason of their misrepresentations as to the strength of said fourth floor of said store No. ...., and by reason of the weakness of said floor and its unfitness for the purposes for which it was leased and used as aforesaid, and by reason of the fault and negligence of said defendant E.... F.... in storing and placing on said floor such great weight as aforesaid, thereby overloading said floor so that it fell as aforesaid, the goods and wares of this plaintiff were injured and destroyed, and the plaintiff otherwise greatly injured and damaged.

VI. That there was thereby then and there destroyed and injured goods and wares of the plaintiff to the amount and of the value of ..... dollars, and that the plaintiff was also deprived of the use of said premises leased by him as aforesaid for the space of three weeks, to his damage ..... dollars, and that by reason of the destruction of said premises the employees of said plaintiff were compelled to and did lie idle for the space of three weeks, until said premises were repaired and again rendered fit for occupation by the plaintiff, to his damage ..... dollars, making in all the sum

of ..... dollars loss and damage suffered and sustained by reason of the fall of such floor as aforesaid.

WHEREFORE the plaintiff prays judgment against said defendants for said sum of ..... dollars and the costs of this action.

1775. Complaint by owner of livestock shipped in another's name against commission merchant, for proceeds of sale (sustained in Potter v. Van Norman, 73 Wis. 339; 41 N. W. 524).

The plaintiff, for cause of action against the defendant, says:

I. That prior to ....., 19.., the plaintiff and one X.... Y.... were the owners of, and in possession of a lot of live hogs, at ..... in the state of ....., of the value of about ..... dollars.

II. That a few days prior to said ....., 19.., this plaintiff delivered the said hogs to the ..... Railway Company, at said ....., and by verbal arrangement and agreement between him and said X.... Y...., consigned the same in the name of this plaintiff as consignor, and to be transported to and delivered by said ..... Railway Company to defendant, a commission merchant at ..... in the state of ....., to be sold by him for this plaintiff, and to account to him for the net proceeds or value thereof.

III. That after said property had been so shipped and consigned by this plaintiff, as aforesaid, and in his name, and as the same was about to be started to ....., the plaintiff and one G.... H.... entered into a verbal agreement, whereby the plaintiff was to sell to said G.... H.... the said property, on the payment to him of the cost thereof, to-wit, ... dollars, and ..... dollars more, the whole to be paid to plaintiff from the proceeds of such stock as soon as sold, and that this plaintiff was to be and remain the full and absolute owner of such property, and the title and right of possession thereof were to remain in him till he was so paid the said sum therefor, and that said property should go forward to ..... in the name of this plaintiff as consignor as already consigned, and that said G.... H.... would be entitled to receive from the proceeds thereof only the excess of its actual cost and ..... dollars aforesaid, and that no

part of said sum has ever been paid plaintiff for said stock.

IV. That after such agreement was so made between plaintiff and said G.... H...., as aforesaid, the said G.... H...., without the knowledge, consent or authority of plaintiff, or plaintiff and said X.... Y...., and in their absence, procured and induced a clerk of the agent of said railway company at said ....., to so change the shipment thereof that the property would go forward in the name of said G.... H.... as consignor; and said clerk thereupon so changed the name of the consignor from that of plaintiff to that of said G.... H...., and the said lot of hogs was thereupon forwarded to said defendant in the name of said G.... H.... as consignor, as aforesaid, but this plaintiff was, in fact, the real owner thereof, and entitled to the proceeds of the same, as aforesaid.

V. That said defendant duly received said lot of hogs, being one car load, and conveyed and delivered to him in car No..... of said ..... Railway Company, about ..... 19.., and on or about the same date sold the same and received therefor the sum of ..... dollars, above all expenses of sale and transportation.

VI. That said defendant, prior to the receipt of, or sale of said hogs, had due and full notice of the plaintiff's ownership of, and rights in and to the proceeds or value thereof, as aforesaid, and plaintiff duly demanded of him such value before the receipt or sale thereof by defendant, but notwithstanding this, said defendant has unlawfully, and without plaintiff's or plaintiff's and said X.... Y....'s consent, converted to his own use the aforesaid value of said hogs, to-wit, the sum of ..... dollars, and refused and still refuses to pay or account to plaintiff, or plaintiff and said X.... Y.... therefor, though due demand has been made on him by plaintiff so to do.

VII. That plaintiff is informed and believes that said defendant claims that said G.... H.... was indebted to him in open account, at and prior to the shipment of said hogs or the receipt thereof by him, in a sum equal to or greater than their value, and that he has passed to the credit of said G.... H.... the value of said hogs, and for this reason refuses to pay plaintiff therefor, but plaintiff says that such indebtedness, if any exist, from said G.... H.... to defendant, was not incurred in any way by reason of or upon the

strength of the shipment of said stock having been changed, as aforesaid, from the names of this plaintiff as consignor to that of said G.... H...., and defendant has suffered no damage nor incurred any risk in any way in consequence thereof, but on the contrary, passed to the credit of said G.... H...., if he has done so at all, the proceeds of such stock after full notice of plaintiff's rights in and to the said proceeds.

VIII. That prior to the commencement of this suit, and in pursuance of the original agreement between said X.... Y.... and this plaintiff, whereby the said hogs were shipped in the name of plaintiff, the said X.... Y.... has duly assigned in writing to this plaintiff all his interest in and to the said hogs, and all his interest in or claim against said defendant for the value of said property, or damages for its conversion, as aforesaid, and plaintiff is the full owner of all such claims and demands against said defendant.

WHEREFORE plaintiff asks judgment against said defendant for said sum of ..... dollars, with interest from ....., 19.., and costs of suit.

1776. Complaint for personal injuries from defendant's negligence, and to set aside release obtained by fraud (sustained in Whetstone v. Beloit Straw Board Co., 76 Wis. 613; 45 N. W. 535).

I. [*Set forth cause of action for negligent injury as in forms in Chapter LIX, supra, and continue as follows:*]

II. That on or about the .... day of ....., 19.., the defendant induced the plaintiff to sign and deliver an agreement of settlement and release for his said injuries, in words and figures as follows, to-wit [*set out copy of agreement, or allege its substance*].

III. That when the plaintiff signed said agreement he was physically very weak and was not in possession of his senses by reason of his aforesaid injuries, and did not know or realize what he was doing, or the effect of said agreement or any of the provisions thereof, and that his said condition was known to the defendant, but that the defendant, taking advantage of the plaintiff's said condition, fraudulently procured the plaintiff's signature to the said instrument, notwithstanding he well knew that the plaintiff did not and

could not comprehend what he was doing, or the nature of said agreement.

IV. That the defendant has paid to plaintiff ..... dollars upon said agreement, and that the plaintiff has given receipts for the same bearing dates ....., ..., ..., and ....., 19..

V. That when the plaintiff recovered so as to be able to give any thought to a business transaction, on being informed of the above agreement, he supposed it was final and binding and that he had no remedy; that he sent for an attorney as soon as his physical and mental condition made it proper for him to do business, and that on being informed said instrument was void, he refused to receive any further payment.

VI. That on the .... day of ....., 19.., the plaintiff tendered the defendant ..... dollars for all payments made to him by the defendant, with interest, and notified the defendant that the contract was rescinded; that the defendant refused to receive the money, and that the plaintiff now brings the said money into court.

VII. That the plaintiff has suffered damages by reason of said injuries, in the sum of ..... dollars.

WHEREFORE the plaintiff demands judgment that the said contract in this complaint mentioned be delivered up by said defendant and be declared null and void, and that he recover judgment against the said defendant for the sum of ..... dollars, together with his costs and disbursements in this action.

1777. Complaint for conspiracy by several, to procure an unlawful abortion upon the plaintiff, and the accomplishment thereof (sustained in Miller v. Bayer, 94 Wis. 123; 68 N. W. 869).

Plaintiff herein, complaining of the above named defendants, respectfully alleges and states to this court:

I. That plaintiff is of the age of twenty-one years, that the date of her birth was ....., 19.., and that she has never been married.

II. That for more than two years prior to ....., 19.., she was employed as a domestic at the house of C.... D.... and E.... D...., in the city of ..... and state of .....,

and has continuously resided in the family of said defendants during said period as domestic as aforesaid.

III. That in ....., 19.., on or about the middle of said month, she was assaulted at the said residence of said defendants C.... D.... and E.... D...., and while a servant as aforesaid in the family of said defendants, by H.... D...., a son of said defendants, and raped and ravished by force and against her will. That thereafter and on several occasions plaintiff was raped and ravished by said H.... D...., at the residence of said D....'s in said city of ....., ... That by reason of said acts of sexual intercourse so accomplished as aforesaid, plaintiff in the month of ....., 19.., became and was pregnant with child by the said H.... D.... Plaintiff avers that said H.... D.... was during the times herein alleged residing in the same house with his said parents, the said C.... and E.... D....; that plaintiff was on and prior to said assault a woman of chaste character.

IV. Plaintiff alleges that the said defendants, the said D....'s, C.... D.... and E.... D...., became and were cognizant of the fact of plaintiff's said pregnancy, as plaintiff is informed and believes, some time in ....., 19..; and that said H.... D.... knew of plaintiff's pregnancy ....., 19.. Plaintiff avers that by compulsion, and duress and threats of said H.... D...., plaintiff was compelled and did submit to the taking of medicine furnished by the defendant G.... H.... [then and there being a practicing physician in the city of .....] to produce a miscarriage on plaintiff. Plaintiff alleges that she continued as a domestic as aforesaid in the family of said D....'s until the .... day of ....., 19.. That at said time, and for some time theretofore, the said C.... D.... and E.... D.... had full knowledge of the said fact of plaintiff's said pregnancy, and that their son H.... D.... was the cause thereof, and to prevent scandal and to endeavor to save the reputation of their said son, entered into a conspiracy with the said G.... H.... and their said son to cause a criminal operation to be performed upon the body of plaintiff, and to have the said G.... H.... perform an abortion upon the body of the said plaintiff. That pursuant to said conspiracy, plaintiff was removed to the house of one L.... M.... in said city of ..... on the .... day of ....., 19.., and on the ....

day of ....., 19.., in said city of ....., ..., said criminal operation was performed on the body of this plaintiff by the said G.... H.... That this plaintiff was then quick with child, which fact was well known to each and all defendants prior to the performing of said abortion as aforesaid. That by reason of said criminal operation, plaintiff became and was sick nearly to death and became and was as she believes, permanently injured. That the health of plaintiff theretofore good has since been very poor. That by reason of said operation, she was sick and ill at said house of said L.... M.... for two and one-half weeks, and thereafter was removed to the .... hospital in said city of ....., and there attended by the physicians and sisters in said hospital, and ill and most of the time confined to her bed at said hospital, from the .... day of ....., 19.., until ....., 19.. She avers that by the collusion of all of said defendants plaintiff was secretly kept at the house of said L.... M...., and all knowledge thereof kept from the parents of plaintiff. That on the .... day of ....., 19.., by the assistance of the police force of said city of ....., the whereabouts of plaintiff were discovered by the parents of plaintiff, and on so finding her as aforesaid, said parents caused the plaintiff to be removed to said hospital for treatment for the illness caused by said abortion.

V. That by reason of the facts the health of the plaintiff has been permanently injured, and she has suffered great mental anguish and bodily pain, and in her reputation and good name, and been greatly damaged, in the sum of ..... dollars, and specially damaged in the expenses of said illness and care at said hospital in the sum of at least ..... dollars, and in the loss of her time and services in the sum of at least ..... dollars.

WHEREFORE plaintiff prays judgment against the defendants, and each of them, for the sum of ..... dollars, and her costs and disbursements herein.

1778. Complaint under Wis. Stats. 1913 sec. 1691, to recover treble the amount of usurious interest paid upon a loan of money (sustained in Matthieson v. Schomberg, 94 Wis. 1; 68 N. W. 416).

I. That on or about the .... day of ....., 19.., the

said defendant did, at the instance and request of these plaintiffs, loan to them the sum of ..... dollars.

II. That the said defendant did, as a condition of the making of said loan to these plaintiffs, demand of them that they should not only repay to the said defendant the said sum of ..... dollars, but also, in addition thereto, a large, exorbitant and usurious sum of money, to-wit, the sum of ..... dollars, for the loan of the sum of ..... dollars loaned to these plaintiffs for the time the same should be retained by them, as hereinafter alleged and set forth.

III. That these plaintiffs did accede to the demands of the defendant, and did, on or about the .... day of ....., 19.., make, execute and deliver to the said defendant, their two certain promissory notes in writing, of which the following are true copies, to-wit [*set forth copies of notes*].

IV. That no other or greater consideration has ever been had or received by these plaintiffs for said notes than the said sum of ..... dollars.

V. That these plaintiffs did have and retain the full sum of two thousand five hundred dollars, loaned to them by the said defendant, from the date of said note until the 28th day of November, 1892, at which time they paid to the said defendant the sum of five hundred dollars on account of said loan.

VI. That these plaintiffs did then have and retain of the said sum of money loaned to them, the sum of two thousand dollars from the 28th day of November, 1892, until the 10th day of January, 1893, on which last mentioned day they paid to the said defendant the sum of five hundred dollars on account of said loan.

VII. That these plaintiffs then had and retained of the amount loaned to them, the sum of one thousand five hundred dollars from the 10th day of January, 1893, until the 16th day of January, 1893, on which last mentioned day they paid to the said defendant the sum of five hundred dollars on account of said loan.

VIII. That these plaintiffs then had and retained of the amount of said loan the sum of one thousand dollars from the 16th day of January, 1893, until the 25th day of January, 1893, at which last mentioned day they paid to the said defendant the sum of one thousand dollars on account of said loan.

IX. That all of said sums of money paid by these plaintiffs to the said defendant were paid to the said defendant at his own instance and request, and that the defendant did accept and receive the same.

X. That on or about the 25th day of January, 1893, the said notes were surrendered to these plaintiffs by the said defendant, and these plaintiffs did then make, execute and deliver to the said defendant their joint promissory note in writing to secure the payment, to the said defendant, of the balance remaining unpaid of the amount of said first mentioned notes, viz: ..... dollars, of which said note the following is a true copy, to-wit [*insert copy of note*].

XI. That no other consideration was ever had or received by these plaintiffs for the said last mentioned note than as above mentioned and set forth.

XII. That the said defendant did receive and accept the said last mentioned note in the place and stead of said first mentioned notes, and did thereafter, and before said note became due, indorse and transfer the said note for ..... dollars to the ..... Bank of .....

XIII. That on or about the .... day of ....., 19.., the said ..... Bank made a voluntary assignment of its property, effects and credits, including the said last mentioned note, to C.... D...., for the benefit of its creditors.

XIV. That the said C.... D...., as such assignee of said bank, did make demand on these plaintiffs for the payment of said note.

XV. That on or about the .... day of ....., 19.., these plaintiffs did pay to C.... D.... as assignee of said bank, the sum of ..... dollars on account of said note, and did fully satisfy said note, and said note was cancelled and surrendered and delivered to these plaintiffs.

XVI. That the amount of interest upon the amount of said loan of two thousand five hundred dollars, and the several parts thereof, for the entire time the same and the several portions thereof respectively, were retained by these plaintiffs, computed at the rate of ten dollars upon one hundred dollars for one year, is forty-nine dollars and sixteen cents.

XVII. That these plaintiffs have paid and the said defendant has received for said loan a much greater sum of money than interest thereon at the rate of ten dollars

upon one hundred dollars for one yea , to-wit, the sum of one thousand dollars.

XVIII. That these plaintiffs have paid and the defendant has had and received for said loan of money, in excess of interest at the rate of ten dollars upon one hundred dollars for one year, the sum of nine hundred fifty dollars and eighty-three cents.

XIX. That one year has not elapsed since the payment of all and any of said sums of money.

WHEREFORE these plaintiffs demand judgment against the said defendant for treble the amount of the money so paid for said loan in excess of interest at the rate of ten dollars upon one hundred dollars for one year, to-wit, for the sum of ..... dollars, with costs and disbursements of this action.

1779. Complaint by several riparian owners, jointly, to restrain an upper owner from wrongfully diverting water from plaintiffs' lands (sustained in G. R. W. P. Co. v. Bensley, 75 Wis. 399; 44 N. W. 640).

I. That each of these plaintiffs is a corporation duly organized under the laws of this state each having its offices and principal place of business at ..... in said ..... county. That the plaintiff A.... B.... company is the owner in fee of the following described premises, rights and privileges in said ..... county, to-wit [*describe lands*]. That all of said lands and premises are upon and appurtenant to the ..... river, which in passing down stream and over the same, has from said lands on said section ..... to the south line of said lands on section .... a fall exceeding ten feet. That said river at, and immediately above the railroad bridge on said lot seven of section ..... is readily improved by dams, thus forming valuable water powers. That the principal and almost sole value of said lands and premises consists in their opportunity and readiness of improvement in connection with said rights and privileges, for hydraulic purposes.

II. That this plaintiff, the C.... D.... company, is the owner in fee of the following described real estate, privileges, and easements, situated, lying and being in said .....

county, to-wit [*describe premises*]; and it is also the owner of the riparian rights, rights of flowage and right of way along the ..... river up stream from that portion on said fractional lot eight to the south line of the right of way of the said ..... railway, and is the owner of all dams and improvements for hydraulic purposes upon, or connected with said premises, and has good right and lawful authority perpetually to build, keep up and maintain all such dams and improvements. That the said premises are chiefly valuable for the water power and mills connected therewith, this said plaintiff, the C.... D.... company having and owning a large and valuable pulp mill, situated and being upon said fractional lot eight, the wheels and machinery of which are propelled by the waters of said river. That said waters of said river are turned to the mill of this plaintiff by means of, and said water power is formed by, a system of dams extending up stream from said mill, and westerly across the main channel of said river to near the foot or south end of what is commonly known as "Nine Acre Island."

III. That this plaintiff, the E.... F.... company, is the owner of the north half of said "Foundry Island," on the said fractional lot eight, of section ...., together with the water rights and privileges appurtenant thereto. That it has upon said premises a large and valuable flouring and grist mill, the wheels and machinery of which are propelled by the waters of said ..... river, taken from the pond formed by the said system of dams of the said C.... D.... company.

IV. That hereto annexed, and forming a part of this complaint, is a plat or map marked "Exhibit X", showing with substantial accuracy, the course and direction of the ..... river as it is, and since the time when the memory of man runneth not to the contrary, hath been located in said section .... in township .... north, of range .... east. That said map shows with substantial accuracy the premises, dams, channels, islands, and their names, mills, etc., in question in this action, as also the relative distances and direction of currents and streams of water as indicated by arrows.

V. That said ..... river is, and ever has been a navigable stream.

VI. And these plaintiffs further allege that the defendant is, or claims to be, the owner of a large pulp mill situated upon the west side of said river upon fractional lot four of said

section ....., at a point further down stream than the mills of plaintiff aforesaid, and that a few rods up stream from the defendant's said pulp mill is the flouring mill of the .... milling company. That as is indicated and shown upon said map "Exhibit X" heretofore, and up to this time, the water to run and operate the defendant's pulp mill, and said flouring mill, has for many years been obtained by confining the water running into the slough at the head, and on the westerly side of "Big Island," and causing it to run around on the west side of "Hunter's Island" and "Nine Acre Island," and through an artificial channel a distance in all of upwards of three miles to said mills. That to keep said water in said slough, and cause it to run on the west side of said islands, the defendant and her grantors have for many years built and kept up and maintained a dam across the so-called "Lost Channel" at the head of said "Hunter's Island," a dam from the foot of "Hunter's Island" to "Nine Acre Island," and a dam from the foot of "Nine Acre Island" to what was formerly a part of the main west shore, where the artificial channel begins. That the waters of said river flowing into said slough at the head of Big Island would, if left unconfined, return again to the main channel of said river at the foot of said islands, mainly at the foot of said Big Island, through said lost channel; and would mingle with and spread out over the waters of such main channel above, and before passing the mills, premises and mill-sites of said plaintiffs on said fractional lots seven and eight of said section .... and that in a natural state of the said stream, less than one-sixth of the waters therein at and above the head of said Big Island would and did originally flow into and down said slough. That as now and heretofore confined the main part of said waters flowing into said slough are not permitted to flow back again into the main channel of said river until they have passed the said mills and sites of these plaintiffs. And plaintiffs insist and allege that such confinement and changing of the natural flow of said waters is and ever has been, unreasonable and in fraud of plaintiffs' rights to the natural flow of waters of said river. That as riparian owners of said fractional lots six, seven and eight in section ...., these plaintiffs have and of right ought to have the free, natural and unobstructed flow of the waters of said river upon and adjoining their premises.

VII. And plaintiffs further show that at divers times during the past three years the defendant has greatly enlarged and increased in width and depth said artificial channel above and leading to her said mill; that she has during said time, blasted out, deepened and enlarged much of said slough from Hunter's Island to the head of said Big Island, and she has during said time greatly raised and improved the said dams between said islands for the sole purpose, and with the intent, of drawing into said slough, and diverting from the main channel of said river, and holding and confining therein until used by her said mill and said flouring mill, more of the waters of said river than would, or have theretofore flowed into and down said slough. That by means of such enlargements and changes, the defendant has diverted from the said main channel far more of the waters of said river than theretofore and before such enlargements and changes naturally flowed into and down said stream; and by such diversion has and does greatly diminish the waters flowing to the premises and mills of these plaintiffs, to their great and irreparable loss and damage. That such diversion is unreasonable, unlawful, and in fraud of the riparian rights, not only of these plaintiffs, but of all owners of lands upon the easterly side of said river in said sections; and it has been a serious injury to the navigation of said river. That by reason of the diversion of the waters of said river by the defendant as aforesaid, the small portion remaining in the main channel and spreading out over the same in thin quantities before reaching the mills and premises of plaintiffs, has become and is by absorption in warm weather, and low stages, and by freezing in winter, greatly diminished in quantity, so much so as frequently to necessitate the stoppage of the mills of the plaintiffs.

VIII. That notwithstanding the premises, the defendant is now engaged with at least forty men, many teams and implements, in still further deepening and enlarging said slough and channel and changing the location of said dams abutting upon Hunter's Island, for the purpose of causing water to flow out of the main channel of said river and down said slough. That from the head, or north end of said Hunter's Island to the south end thereof, through and by way of said Lost Channel, is a much greater fall and wider channel with less obstruction than by the slough, or channel

on the west side of said Island, where the water has heretofore been made to flow. That to get the benefit of the greater fall down said Lost Channel, and the greater force and suction upon the stream running into said slough at the head of said Big Island, the defendant is now engaged in building a long tight dam at the foot of said Big Island, and connectiing it with a small island, lying south-easterly of the foot of said Hunter's Island, and also another dam from the foot of said small island to near the head of said "Nine Acre Island;" intending when said dams are complete to remove the dam heretofore maintained from the head of said Hunter's Island to said Big Island, thus causing the waters in said slough to flow mainly down said Lost Channel, and around the foot of Hunter's Island, and west side of Nine Acre Island, and to the mill of the defendant. That by thus changing her dams she secures the benefit to her and the increased suction upon the slough above of the two channels around Hunter's Island. That she has, with a large crew of men, entered upon the lands of this plaintiff, the A.... B.... company, at the head of said Big Island, and taken possession thereof, and has built a temporary dam, or coffer dam, at the head and across the mouth of said slough, and is engaged with men and teams digging out, deepening and enlarging said slough at and near its mouth, and from there to the head of said Hunter's Island.

IX. That the entry and possession of the defendant upon and of the lands of this plaintiff, is wrongful and unlawful, and if not restrained, will, as plaintiffs greatly fear, result in violence and a multiplicity of suits.

X. That the dams being erected by the defendant at the foot of Big Island and the head of Nine Acre Island, are intended for permanent work, and are not for a temporary purpose.

XI. And these plaintiffs further show that the further diversion of the waters of said river by the defendant by means of the dams and enlargement of said slough as aforesaid, will be an unreasonable and unjust diversion, and will result in great and irreparable loss and damage to these plaintiffs. That if the defendant is permitted to deepen, enlarge and dig out said slough as she now threatens and intends to do, and in fact is engaged in doing, and is permitted to draw the waters of said slough around the easterly side of said Hunter's

Island, through the Lost Channel, she will compel a large proportion of the waters of said river, to-wit, upwards of two-thirds, to flow into and down said slough to her mill, and the waters in the main channel of said river, and running to the mills and premises of these plaintiffs, will be so greatly diminished in quantity as to be entirely insufficient and inadequate for hydraulic purposes, and it will be utterly impossible for plaintiffs to run and operate their said mills during a considerable portion of each year.

XII. And plaintiffs further show that their said water powers, mills, mill sites and riparian rights, will be greatly injured and damaged if the defendant is permitted to complete said works and divert the water as aforesaid, and they will suffer great and irreparable loss and damage in being thus deprived of the flow of said stream. That they have no adequate remedy at law, and therefore pray the aid and judgment of the equity powers of this court:

That the defendants be perpetually enjoined and restrained from in any manner or by any means turning or diverting the waters of said ..... river from the main channel thereof at the head of Big Island into said slough on the westerly side of said Island;

From digging out, deepening or enlarging said slough and channel in any manner;

From causing the waters in said slough at and above said Hunter's Island to flow on the easterly side thereof through or down said Lost Channel, to her mill.

That she be enjoined and restrained from in any manner interfering with the natural flow of the waters of said river upon or adjoining the premises of the said plaintiffs, and that the plaintiffs have such other and further relief as may be just, and that they recover costs.

Further, plaintiffs pray a temporary injunction pending the trial of this action as above, and restraining the defendant from trespassing upon said plaintiff's lands at the head of said Big Island.

O.... P....
Plaintiffs' Attorney.

[*Verification.*]

1780. Complaint in equity for a continuing trespass caused by building and maintaining a stone foundation wall on plaintiff's lot (sustained in Rahn v. M. E. R. & L. Co., 103 Wis. 467; 79 N. W. 747).

The plaintiff above named complains of the defendants above named, and for cause of action alleges:

I. That the defendant, the L.... M.... street railway company is a street railway corporation organized and existing under the laws of this state, and prior to the year 19.. was and still is the owner of and engaged in operating a street railway in the city and county of ....., in the state of .....

II. That the plaintiff herein is the owner of and has an estate in fee simple in and to the following described land situate in the city and county of ..... and state of ....., to-wit [*describe lots*], which said lots have thereon two two-story frame buildings and one one-story frame building, which said buildings are on the northerly line of said lots and cover the same nearly or quite to the north line thereof, and that the plaintiff is now in possession of the said lands and buildings, and that she and her immediate grantors have been in possession thereof for twenty-eight years last past.

III. That in the year 19.. the said defendant was, and still is, the owner of lots two and three, and four, etc., in said block ...., the said lots numbered five and .... belonging to the said L.... M.... street railway company adjoining the premises of the plaintiff on the northerly line thereof.

IV. That in the said year 19.. the said defendant erected upon its land a large brick building about forty feet in height, and covering all its lands, which said building was to be used as a repair shop for the repairing of its cars, machinery and appliances used in operating its lines of street railway, and in erecting said building, and for the purpose of laying a foundation wall therefor, excavated the ground along the south line of its said lots numbered five and .... adjoining the premises of the plaintiff to the depth of several feet, and below the foundation walls of the buildings of the plaintiff erected and then standing upon her said lots ...., ... etc., and excavated beneath and undermined the foundation wall

sustaining the said buildings of the plaintiff, and dug into and removed the soil from the premises of said plaintiff, without the plaintiff's consent, and without her consent and against her protest, built, erected and caused to be built and erected upon its said lands and upon the lands of the said plaintiff a heavy foundation wall of stone, three feet or more in thickness, which said foundation wall and the footing stones of the same extend into and upon the premises of said plaintiff and extend underneath the foundation wall sustaining the said buildings of the said plaintiff for a distance, varying from five to nine inches and upwards along the whole northerly line of said lots numbered ...., ..., etc.

V. That by reason of the undermining of the foundation wall of the buildings of the said plaintiff and the removal of the soil thereof, as aforesaid, the plaintiff's buildings sank down and settled, throwing the said buildings out of plumb, and caused the same to pitch and lean to the north, cracking and breaking the plastering in the said buildings, causing the cellar walls of said buildings to cave in and the floors of said buildings to sink down, and so wrenching and straining the said buildings as to prevent the doors thereof from opening and shutting until the same were rehung and changed, to the great damage of the said plaintiff and her said buildings, to-wit, in the sum of ..... dollars.

VI. The plaintiff further alleges that the said defendant, the L.... M.... street railway company, claims the right to keep and maintain, and does still keep and maintain, the said foundation wall of its said building upon the premises of the said plaintiff, and refuses to take down and remove the same or any part thereof therefrom.

VII. That the said described lands of the said plaintiff are of great value, are situate in the business district, and are quite suitable for business purposes, and that it was and is the intention of the plaintiff, as soon as she is able to do so, to erect thereon a brick building, covering said lots, for business purposes, but that she is and will be prevented from occupying and using the whole of said land for such purpose by reason of the intrusion of the foundation wall of the defendant's said building thereon, and that the value of her said lands is greatly diminished, and the same made unsalable, and the plaintiff greatly damaged in consequence, to-wit, in the sum of ..... dollars.

VIII. That the said lot .... of said plaintiff has a frontage of .... feet on .....avenue, and that said lot .... which adjoins said lot .... on the west, has a frontage of .... feet on ..... street, in said city of ....., making a strip of land .... feet in width extending through the center of said block from ..... avenue to ..... street, and that a frontage of .... feet upon a business street is the smallest frontage salable or available for business purposes, and that any reduction of the frontage of a lot below .... feet largely diminishes and destroys the value thereof, and that the said foundation wall of the said defendant's said building extending into and upon her lands as aforesaid and underneath the foundation walls of her buildings erected thereon deprive her of the full use, occupation and enjoyment of said lot, and will prevent her and her grantees and assigns from using and occupying the same for the purpose of building and erecting a foundation wall to sustain the buildings now or hereafter erected thereon.

IX. The plaintiff further alleges that the points and places where the said foundation wall of the defendant's building extends into and upon the lands of the plaintiff as aforesaid is below the surface of the earth and below the foundation wall of her buildings standing thereon and said foundation wall of defendant's building cannot be cut off and removed from the plaintiff's land from the plaintiff's premises without taking away and removing the soil, and tearing down and removing the foundation wall of her buildings erected and standing upon her lands, and that the removal and cutting off of the said foundation wall of the defendant's building extending from the plaintiff's premises would entail upon the plaintiff great cost, damage and expense.

WHEREFORE the plaintiff demands judgment:

1. That she may be adjudged and decreed to be the owner of said lots .... and .... of block .... in ..... subdivision in the .... ward of the city of ..... in fee simple, and as such owner entitled to the free and full use and occupation thereof without let, hinderance or obstruction by the said defendants, or either of them.

2. That the foundation wall of the defendant's building, so far as it extends into and upon the lands of the said plaintiff and underneath the foundation walls of the buildings stand-

ing upon the plaintiff's lands, be adjudged and decreed to be an unlawful encumbrance and obstruction thereon, and that the said defendant be adjudged and directed within a certain time to be in said judgment ascertained and limited to remove the same therefrom without removing or digging up the soil of the said plaintiff or trespassing upon her premises for the purpose of so doing.

3. That the said defendant be decreed and directed by said judgment to replace upon the premises of said plaintiff the soil and other material unlawfully removed therefrom in such manner as to sustain the plaintiff's building and the foundation walls thereof.

4. That the plaintiff be further adjudged and decreed to have and recover from the said defendants such damages as she may be found to have suffered by reason of the premises together with the costs and disbursements of this action, and that she have such further and other relief in the premises as to the court may seem just and equitable.

O.... P....
Plaintiff's Attorney.

[*Verification.*]

1781. Complaint against surety company upon an undertaking given to release garnishment, and pay judgment under Wis. Stats. 1913 sec. 2771 (from complaint in Wilkinson v. U. S. F. & G. Co. 119 Wis. 226; 96 N. W. 560).

I. That the defendant was, at the dates and times hereinafter mentioned, and now is, a corporation, of ....., organized pursuant to the laws of the state of ..... and authorized to do business as a surety company under the laws of the state of .....

II. That on the ..... day of ....., 19.., the plaintiff, A.... B.... commenced an action against one E.... F.... in the ..... court of the county of ..... in the state of ....., and one G.... H.... was garnished in said action, an affidavit and summons in garnishment in said action being served upon said G.... H.... on the .... day of ....., 19..

III. That thereupon the said principal defendant E.... F.... desiring to have the said garnishment released, applied

to the court for an order fixing the terms of the undertaking to be given to procure such release.

IV. That the said court, by an order dated ....., 19.., fixed the terms of the undertaking for such release, as follows: That upon the principal defendant filing an undertaking in the office of the clerk of the said ..... court of ..... county to the effect that the sureties would pay on demand to the plaintiff the amount of the judgment with all costs that might be recovered against such defendant not exceeding the sum of ..... dollars, that then the said garnishment up to the amount of said ..... dollars, should be released.

V. That pursuant to said order the said defendant, on the .... day of ....., 19.., executed and filed an undertaking in the office of the clerk of said court whereby it undertook, covenanted and agreed that it would on demand pay to the plaintiff A.... B.... the amount of the judgment with all costs that might be recovered against the said defendant E.... F.... in said action, not exceeding the sum of ..... dollars, a true copy of which undertaking is hereto annexed, marked "Exhibit A", and made a part of this complaint.

VI. That on the .... day of ....., 19.., the said plaintiff A.... B.... recovered judgment against the said defendant E.... F.... in the sum of ..... dollars, no part of which has been paid.

VII. That on the .... day of ....., 19.., the plaintiff in this action demanded of the defendant herein the payment up to the amount of ..... dollars, but the said defendant neglected and refused to pay said judgment or any part thereof, and still neglects and refuses to do so.

WHEREFORE plaintiff demands judgment against the defendant for the sum of ..... dollars, with interest from the .... day of ....., 19.., together with the costs of this action.

O.... P....
Plaintiff's Attorney.

[*Verification.*]

1782. Complaint by creditor of deceased person to reach lands purchased by deceased, and conveyed to another, and subject them to a trust in favor of creditors, under Wis. Stats. 1898 sec. 3835 (sustained in Allen v. McRae, 91 Wis. 226; 64 N. W. 889).

The above named plaintiff, for her cause of complaint respectfully shows to the court, and alleges in behalf of herself and the other creditors of L.... M.... deceased:

I. That one L.... M...., being at the time wholly insolvent and indebted to this plaintiff and others, did on the .... day of ....., 19.., purchase from one X.... Y...., and W.... Y...., her husband, the following described land and real estate, situate in the city of ....., in the county of ..... and state of ....., described as follows, to-wit [*describe land*]. That the said L.... M.... paid and advanced the entire consideration and purchase money of the land and real estate above described, but caused the title thereto to be conveyed to the said C.... D...., the above named defendant, by good and sufficient warranty deed in the usual form by the said X.... Y.... and W.... Y.... instead of himself, and the said C.... D.... became vested with the legal title thereto; that said transfer to said C.... D.... of said land and real estate was made and intended to be in secret parol trust for the sole use and benefit of said L.... M.... pursuant to an agreement and understanding existing between said L.... M.... and said C.... D.... for the sole purpose and with intent to injure, hinder, delay and defraud the creditors of the said debtor L.... M...., so that the said above described property and real estate so fraudulently conveyed, as aforesaid, could not be subjected to the payment of the debts of the said L.... M....; that the legal title to the above described land and real estate has continued to remain in the said C.... D.... ever since the .... day of ....., 19.., in fraud of the existing creditors of said L.... M....; that said defendant E.... D.... was and is the husband of the defendant C.... D.... and acted as her agent in all of her dealings with the said L.... M.... and at all of the times herein mentioned the said defendants C.... D.... and E.... D.... have resided and still do reside in the city of .....

II. That the said L.... M...., at the time, was indebted to this plaintiff in the sum of ..... dollars, and was indebted to divers other parties, and continued up to the time of his death, ..., 19.., to be wholly insolvent; that on the .... day of ....., 19.., this plaintiff duly filed her claim, as provided by statute, against the estate of L.... M.... in the ..... court of ..... county, and that on the .... day of ....., 19.., said claim came up for hearing, and after a trial on its merits judgment was rendered in this plaintiff's favor for the sum of ..... dollars; that of that sum of ..... dollars there was due and owing to this plaintiff at the time of the transfer of the heretofore described property to the said C.... D.... the sum of ..... dollars.

III. That O.... P.... has been duly appointed and is now the administrator of the estate of the said L.... M.... deceased, and that as such administrator no funds belonging to said estate have come into his hands, and that there is no property belonging to said defendant out of which this plaintiff can collect her claim.

IV. That on the .... day of ....., 19.., an execution by leave of court was duly issued out of the ..... court of ..... county, on a judgment rendered in an action in which R.... S.... was plaintiff and L.... M.... was defendant, and on the .... day of ....., 19.., said execution was duly returned wholly unsatisfied, showing the estate of the above named L.... M.... to be wholly insolvent; that this plaintiff brings this action in behalf of herself and all the other creditors of L.... M.... whose claims existed at the time of the transfer of said above described lands and real estate to the defendant C.... D...., to-wit, on the .... day of ....., 19..

WHEREFORE, plaintiff asks that the defendant C.... D.... be adjudged a trustee of the above-described land and real estate for the benefit of this plaintiff and the other existing creditors of the said L.... M.... at the time of said above-mentioned conveyance, and that the court appoint a receiver to take and sell said property or so much thereof as may be necessary to pay the existing creditors of the said L.... M...., and that the said creditors be called in and an order made for the payment of their said claim, and that the said defendants E.... D.... and C.... D.... be required to account for the rents and profits of said real estate to

said receiver, from the .... day of ....., 19.., if the same shall be necessary to pay this plaintiff's claim with interest and costs of this action, together with the claim of the other existing creditors, with interest on the same, and to grant such other or further relief or judgment as to the court may seem just and equitable.

1783. Complaint to enjoin use of trademark and label, and to recover damages (sustained in Leidersdorf v. Flint, 50 Wis. 401; 7 N. W. 252).

I. That the above named plaintiffs are co-partners in trade doing business under the firm name and style of A.... B.... & Co., at the city of ..... and elsewhere, and as such are manufacturers and dealers in tobacco.

II. That during all the time the said firm of A.... B.... & Co. has been in existence, they have manufactured and sold a special article of smoking tobacco, put up in packages of a certain form in paper wrappers of a particular color and mark, and stamped with the words and name "Nigger Hair Smoking Tobacco," and otherwise distinctively marked and designated, as hereinafter set forth.

III. That during all the said period of .... years they have exclusively used and are now using, and had, and still have the right so to use the said name and mark hereinafter more particularly described, as a trademark for such smoking tobacco; and that no other person than the said firm has at any time had the right to make use thereof or of any like mark or name, or of any near resemblance thereto.

IV. That at the present time and for many years last past, the plaintiff's said firm have packed such tobacco in yellow wrappers on which were printed in black ink the words [*here describe label particularly and fully*]. That these words and marks, together with the vignette so printed and stamped on packages and labels as herein stated, and the general disposition and arrangement thereof as set forth, constitute, and during the period aforesaid have constituted the proper trademark of the said firm of A.... B.... & Co., and the same has during said period been, and is now, used and employed by them, both upon said packages of smoking tobacco and upon labels and cards affixed to boxes and cases containing the same, and to exhibit for advertising said

tobacco, as the peculiar and proper trademark of the said A.... B.... & Co.

V. That by reason of the long experience, industry, honesty and great care of said plaintiffs' firm in their business, and the good quality of their said smoking tobacco, and the peculiar and distinct features of their said trademark, the said "Nigger Hair Tobacco" has become widely and familiarly known to the trade throughout various portions of the country as an excellent and reliable article of smoking tobacco, and has acquired a high reputation as such, and has commanded, and still commands very extensive sales, which are a source of great profit and revenue to these plaintiffs.

VI. That the said smoking tobacco is known to the trade and to the public and to the buyers and consumers thereof by the name of "Nigger Hair Smoking Tobacco," and by the plaintiffs' own peculiar device and trademark aforesaid.

VII. That the said tobacco is a low priced tobacco, and is to a very large extent bought and consumed by a class of people who cannot read, and whose necessities and manner of living do not require them to practice more than ordinary caution when purchasing the commodities most frequently procured; and to this class of people the said tobacco has become known and is easily recognized largely by reason of the said peculiar and distinctive trademark aforesaid, a copy or specimen of which, upon one of said paper wrappers, is hereto attached and marked "Exhibit A," and to which reference is here made.

VIII. And the plaintiffs further allege that notwithstanding the long and quiet use and enjoyment by said A.... B.... & Co. of said trademark, the defendant C.... D...., well knowing and understanding these plaintiffs' rights, but wilfully disregarding the same, at some time in the year 19.., the precise date whereof is unknown to plaintiffs, devised, prepared and executed, or procured to be devised, prepared and executed, a certain device and paper wrapper and show cards in imitation and counterfeit of those of the plaintiffs hereinbefore described, and then and since then has and does manufacture and sell and offer for sale a certain grade of smoking tobacco similar in many respects to that of the plaintiffs, but inferior thereto in quality, and has and does offer for sale the same in the wrappers

last aforesaid, put up in packages of the form, style, color and general appearance of the said "Nigger Hair Tobacco" of the plaintiffs, and has sold and still continues to sell the same in large quantities within the state of ..... and elsewhere, thus labelled, marked and made up in imitation of plaintiffs' said trademark and packages.

IX. That said defendant, until about the .... day of ....., in the year 19.., employed in his said imitation and counterfeit of plaintiffs' trademark, marks and devices of such striking and close resemblance thereto, both in the vignette aforesaid and in the marks and letters about the same and otherwise, that the distinction and difference between plaintiffs' trademark and defendant's said imitation could be, and is, discovered and noticed only by the most cautious and wary purchaser and consumer of tobacco, and would scarcely be discerned at all by persons practicing ordinary observation, or whose attention had not been specially directed thereto. That defendant's said imitation contains the words "Big Indian"' at the corresponding place in the label as the words "Nigger Hair" of plaintiffs' mark, having the letters thereof of such arrangement and construction and form, as greatly to resemble the words "Nigger Hair" of plaintiffs' label, and above these words is the vignette of a black savage closely resembling in general effect and general appearance the vignette of plaintiffs' trademark, both in size, color, position, ornamentation, facial angle presented, and idea; a copy or specimen of which upon one of the said wrappers is hereto attached and marked "Exhibit B," and particularly referred to.

X. And the plaintiffs further allege that the said defendant's said imitation has been so devised, prepared and executed, as to result in effecting the sale of the tobacco of the defendant as and for and instead of that of the plaintiffs' known as aforesaid, as "Nigger Hair," and to supplant the plaintiffs in their extensive and profitable sales thereof. And although the plaintiffs have repeatedly requested the defendant to desist in his use of the said counterfeit and imitation, he has refused to do so, but has so continued to employ and use the devices and marks shown at "Exhibit B," until he has established his said counterfeit article of tobacco upon the market, and introduced it to the trade and public as a brand of smoking tobacco, which in appearance and for

purposes of sale is readily and frequently mistaken, sold and bought for the said tobacco of the plaintiffs, and until he had in fact to the extent of his said sales supplanted the tobacco of the plaintiffs through said imitated marks and devices and the consequent deceit practiced upon the public thereby; and until he had so wrongfully attracted and diverted trade from the plaintiffs to himself by the means aforesaid.

XI. And the plaintiffs further say they are informed and believe that said defendant so as aforesaid continued to use said imitation of plaintiffs' trademark, until believing he could retain and keep the trade so as aforesaid already attracted and diverted to him, by means of further using a less close and striking resemblance to plaintiffs' trademark, he artfully contrived and executed certain changes in his said imitation of plaintiffs' trademark, so as to be able to assert the pretense and excuse that he had ceased using the imitation shown at "Exhibit B", whereas in fact the said modification and changes were not in the chief characteristic of said label, and the same still presents to the public the impression and idea that the same is the badge or mark of the said plaintiffs, so as aforesaid described, and now does strongly resemble the plaintiffs' trademark in all its chief and most essential features. A copy of which said second device of the defendant, and a specimen of the same, together with the paper wrapper is hereto attached and marked "Exhibit C."

XII. And the plaintiffs further allege that the imitations aforesaid are calculated to deceive the general public and especially the small purchasers and consumers of tobacco, and that the form, size, color and devices of the packages of tobacco of the defendant are intended to be and are in such imitation of and resemblance to those of the plaintiffs and are contrived and calculated to, and actually do mislead the public in that regard, and cause among consumers the idea that the two articles of tobacco are identical, and are manufactured by the said plaintiffs.

XIII. And the plaintiffs further say that for several months last past, beginning at a date which is unknown to them, the defendant has manufactured and sold smoking tobacco in the packages of the kinds above described, and has, as they are informed and believe, put forth the same in the market, and has endeavored to procure others to sell and deal in the same, as the identical "Nigger Hair" tobacco of

the plaintiffs. And the plaintiffs are informed and believe that in many instances the said tobacco of the defendant has been sold as and for the said "Nigger Hair" tobacco on account of the similarity of the appearance of the packages and marks as hereinbefore stated.

XIV. And the plaintiffs further say that their said tobacco had come to be very favorably known, and largely bought and consumed in the state of ..... and elsewhere, and that at the time when the defendant first began to sell tobacco in packages imitating those of the plaintiffs, the amount of the plaintiffs' sales was very large and constantly increasing, and their trade in said tobacco was very extensive and profitable. And that the defendant has greatly injured and damaged the plaintiffs in their said business by his sales of the said imitation of their "Nigger Hair" tobacco, both because they have diminished the amount of the sales so heretofore made by the plaintiffs of their said tobacco, and because the defendant has thereby placed upon the market an article of tobacco now extensively dealt in by the trade, which closely resembles in the size, color and general appearance of the packages in which it is sold by the defendant, and in the marks upon the same, the said packages manufactured and sold by the plaintiffs, and which is of an inferior quality thereto, and which, as aforesaid, is frequently mistaken for the tobacco of the plaintiffs for the reasons aforesaid, and has thereby injured the reputation of the plaintiffs' said tobacco among those who purchase or have purchased defendant's said tobacco, supposing it to be that manufactured by the plaintiffs.

XV. And the plaintiffs further say that before the commencement of this action they requested the defendant to desist from using both of said imitations above described and from their said infringement of plaintiffs' trademark, and to pay to the plaintiffs what upon a just accounting there would be due to them therefor, but the defendant refused so to do, and still continues to manufacture and sell such tobacco put up and stamped in imitation of the plaintiffs' trademark as aforesaid and in disregard and violation of their rights, and thus threatens to cause irreparable injury to the plaintiffs.

XVI. And the plaintiffs further say that by reason of the premises and of the aforesaid acts and doings of the said

defendant, they have been injured to their damage ..... dollars.

WHEREFORE the plaintiffs demand judgment against the defendant:

1. That the said defendant, his agents and servants may be perpetually enjoined from using the marks and devices now used by him or heretofore used by him, and shown by copies as "Exhibit B" and "Exhibit C," and from using any other marks, names or letters in imitation of the plaintiffs' trademark, or of any resemblance thereto.

2. That the defendant make full and true and perfect account of all the profits of every description, which he has made or might have made upon sales of smoking tobacco made by him or his agents wherein the packages of tobacco sold bore any device or marks similar to or like plaintiffs' trademarks; and that he be adjudged and decreed to pay over all of such profits to the plaintiffs.

3. For the sum of ..... dollars.

4. For the costs of this action, and for such other and further relief as to the court shall seem just.

1784. Complaint by grantee of real estate, whose deed was unrecorded, against grantor for conveying same to an innocent purchaser (sustained in Ring v. Ogden, 45 Wis. 303).

I. That on and prior to the day when the deed first hereinafter mentioned was executed and delivered, C.... D...., the defendant in this action, was the owner in fee simple of the following described real estate, situate, lying and being in the county of ..... and state of ....., and known and designated as so much of [*give description*].

II. That on or about the .... day of ....., 19.., the defendant, by his certain warranty deed of that date, executed by himself and wife, under their hands and seals, and duly stamped according to the act of congress in such case made and provided, and delivered to one J.... K...., of the city of ....., conveyed said real estate to said J.... K.... in fee simple.

III. That afterwards, and on or about the .... day of ....., 19.., the said J.... K.... by his quitclaim deed of that date, executed by himself and his wife under their

hands and seals, and delivered to the plaintiff, conveyed said real estate in fee simple.

IV. That neither of the aforesaid deeds have ever been recorded in the office of the register of deeds of ..... county.

V. That afterwards, and on or about the .... day of ....., 19.., the defendant, well knowing that he had parted with said real estate as aforesaid, and that he had no longer any interest therein, fraudulently and wrongfully and by means of his certain quitclaim deed of that date, executed by himself and his wife under their hands and seals, conveyed the same real estate to one L.... M...., which deed was recorded in the office of the register of deeds of ..... county, on the .... day of ....., 19.., on page .... of volume .... of the Records of Deeds in said office, that said defendant having previously, and on or about the .... day of ....., 19.., well knowing that he had parted with said real estate as aforesaid, and that he no longer had any interest therein, fraudulently and wrongfully and by means of his certain warranty deed of that date, executed by himself and his wife under their hands and seals, conveyed the same real estate to the same L.... M...., which deed was also recorded on the .... day of ....., 19.., on page .... of volume .... of the Records of Deeds, in said office of the register of deeds of ..... county.

VI. That afterwards, and on or about the .... day of ....., 19.., the said L.... M.... by his warranty deed of that date, executed by himself and his wife under their hands and seals, conveyed the same real estate to R.... S....

VII. The plaintiff alleges, upon his information and belief, that the said R.... S.... when the deed last aforesaid was executed and delivered to him, had no knowledge or information of said unrecorded deeds or either of them; and the plaintiff further alleges that said real estate was then and there vacant and unoccupied, and that said R.... S...., by means of said last mentioned deed became an innocent purchaser of said real estate, and was and ever since has been the rightful, and legal owner thereof to the exclusion of the plaintiff's just rights therein. The plaintiff further shows that said last mentioned deed was recorded in the office of said register of deeds on the .... day of ....., 19.., on

page .... of volume .... of the Records of Deeds in said office.

VIII. The plaintiff further shows that by reason of the aforesaid fraudulent and wrongful acts of the defendant, whereby the plaintiff lost and was deprived of the title of said real estate as aforesaid he has suffered damage and loss to the amount of ..... dollars, of which sum the defendant has paid to the plaintiff, in part satisfaction thereof, the sum of ..... dollars, and no more.

WHEREFORE the plaintiff demands judgment of this court, that he recover of and from the defendant the sum of ..... dollars, the balance remaining unpaid of his damages in the premises, and the costs of this action.

1785. Complaint for maliciously filing lis pendens and preventing sale of plaintiff's land (sustained in Smith v. Smith, 20 Hun, 555).

I. That at the times hereinafter mentioned the plaintiff was and still is the owner in fee of the following described premises in the city of ....., state of ....., viz. [*describe premises*].

II. That the defendants, on the .... day of ....., 19.., through their attorney duly authorized, filed or caused to be filed in the office of the register of deeds of the county of ..... in said state, being the county in which said real estate is situated, a notice of the pendency of an action in the ..... court, wherein the defendants herein were plaintiffs, and this plaintiff and others were defendants, in which notice it was alleged that said last named action had been commenced and was pending, to recover the alleged interest of one G.... H.... in the said premises; that the complaint in said action was filed in the office of the clerk of said court on said day, and was referred to in said notice, and alleged and declared the said premises to be the property of said G.... H...., and that plaintiff's title thereto was fraudulent and void as against the plaintiffs therein, who alleged that they were judgment creditors of said G.... H....

III. That the said defendants, well knowing that plaintiff was in fact the owner of said premises, maliciously and without reasonable or probable cause, continued to cause it to be suspected that this plaintiff was not the owner of said

premises, but that her apparent title thereto was fraudulent and void, and to prevent this plaintiff from effecting a sale thereof, wrongfully and maliciously, and without probable cause therefor or for the bringing of said action, caused said notice to be filed as aforesaid, and thereby gave notice to all the world of all the matters alleged in said notice and in said complaint.

IV. That the statements and allegations contained as aforesaid, in said notice, and in said complaint, charging that the plaintiff's title to said lands was fraudulent and void, were and are wholly false, and were made maliciously and without probable cause, and with the intent to injure the sale of said premises, as well as this plaintiff, and to prevent the sale of said premises.

V. That thereafter, and on the .... day of ....., 19.., the said notice of pendency of action was duly canceled of record, by order of said ..... court, which order was duly made upon the application of the defendants, through their said attorney, whereby the said notice ceased to have any effect.

VI. That after the filing of said notice and before the same was canceled, as aforesaid, to-wit, on or about the .... day of ....., 19.., this plaintiff had a *bona fide* offer and could have sold said premises for the sum of ..... dollars, to one J.... K...., but that in consequence of the filing of said notice, and the allegations contained therein and in said complaint, plaintiff was prevented from effecting a sale thereof to said purchaser, to the plaintiff's damage ..... dollars.

WHEREFORE the plaintiff demands judgment for the said sum of ..... dollars, with the costs and disbursements of this action.

1786. Outline of complaint by chattel mortgagee as intervenor in an action by the mortgagor against wrong doer for destruction of the mortgaged property.

Now comes A.... B.... intervening in the above entitled action and alleges:

I. [*Allege the giving by the plaintiff in the action of the note or notes which the chattel mortgage secures, describing the*

note or notes accurately or giving copies of them.]

II. *Allege the giving of the chattel mortgage to the intervenor to secure the notes and the due recording of the mortgage in the proper office, giving a copy of it or a sufficient statement of its provisions.*]

III. [*Allege the facts showing that the defendant negligently or wilfully destroyed the mortgaged property or injured the same, and also allege the value of the property and the amount of damage.*]

IV. [*Allege the amount due on the debt secured by the mortgage at the time of the destruction or injury of the property and that it still remains due.*]

V. [*Allege the fact, if it be a fact, that the maker of the note are insolvent and that the mortgaged property is entirely insufficient security for the debt, showing what the deficit will be.*]

WHEREFORE this intervenor demands judgment against the defendant for ..... dollars, with costs, and that the claim of the intervenor be given preference over any claim of the plaintiff in this action.

1787. Outline of complaint for damages on account of change of street grade.

I. [*Allege incorporation of the defendant city.*]

II. [*Allege the plaintiff's ownership of the lot or property damaged by the change of grade, describing the same.*]

III. [*Allege the establishment by the city of the first grade of the street adjacent to the plaintiff's lot and state the time when the said grade was established, that the street was actually brought to the grade so established, and that the plaintiff's lot and other lots along the street were fully graded and improved to correspond to the grade of the street so established.*]

IV. [*Allege the buildings that were erected in accordance with that grade and other improvements which were made.*]

V. [*Allege the establishment of the new grade and the date thereof and the difference between the second grade and the first; also allege the consequences of such change of grade to the plaintiff's property, the impairment of access thereto or the necessity of building retaining walls or otherwise.*]

VI. [*Allege the money damage resulting from such change of grade to the plaintiff's property.*]

WHEREFORE [*demand of judgment for the money damages so created.*]

1788. Complaint by surety to compel principal to pay the debt for which surety is bound (Minn. Gen. Stats. 1913 sec. 7684).

I. That on the .... day of ..... the defendant C.... D.... made and delivered to the defendant E.... F.... his promissory note in writing of which the following is a copy [*insert copy of note*] [*If the instrument was a bond or other contract state the fact and insert or attach a copy.*]

II. That prior to the delivery of said note [bond *or* contract *as the case may be*] the plaintiff at request of the said C.... D.... signed the same as surety for the said C.... D....

III. [*Allege default as for instance*]: That said note became due on the .... day of ....., 19.. but no part thereof has been paid and there is now due thereon ..... dollars with interest from ....., 19.., for which sum the plaintiff is liable as surety aforesaid. [*If the contract be not a note the default and the amount due should be otherwise set forth, according to the fact, practically as if the pleading were a complaint in an action by E.... F.... against C.... D.... for for breach of the contract.*]

WHEREFORE plaintiff demands judgment against defendant C.... D.... adjudging that he pay defendant E.... F.... ..... dollars, the amount due on said note, including interest, with costs to plaintiff.

1789. Outline of complaint for injury to business from sale of impure food.

I. [*Allege the corporate existence of either or both parties according to the fact as in Forms 848 or 849.*]

II. [*Allege the business of the plaintiff.*]

III. [*State the business of the defendant and show that it was dealing in the food which is charged to have been impure.*]

IV. [*Allege the purchase by the plaintiff of the defendant of the food which is claimed to have been impure and the sale thereof to plaintiff's customers.*]

V. [*Allege the impure character of said food and that same was known or ought to have been known to the defendant, and allege further the consequences upon the plaintiff's customers.*]

VI. [*Allege injury to the plaintiff in his good name and reputation and in his business, and allege the amount of damages.*]

WHEREFORE, etc.

1790. Outline of complaint against sheriff and purchaser on execution to set aside levy upon plaintiff's homestead.

I. [*Allege the official character of the defendant sheriff.*]

II. [*Allege the plaintiff's ownership of the premises and the fact that it was prior to the execution levy and still is plaintiff's homestead.*]

III. [*Allege the recovery of the judgment against the plaintiff on which the execution in question was issued.*]

IV. [*Allege the issuance of the execution and its receipt by the sheriff.*]

V. [*Allege the sale of the premises by the sheriff under the direction of the judgment creditor and the striking off of the same to the other defendant also the delivery of the sheriff's certificate of sale to the purchaser.*]

VI. [*Allege that the defendants had notice at the time of the sale that the premises were the homestead of the plaintiff.*]

VII. [*Allege that the sale and certificate constitute a cloud on the plaintiff's title.*]

WHEREFORE [*demand of judgment vacating the levy and sale and cancelling the certificate.*]

1791. Outline of complaint for refusal to transfer corporate stock on books.[1]

I. [*Allege the corporate character of the defendant as in Form 848.*]

II. [*Allege the ownership by the third person from whom the plaintiff claims title of the shares of stock in question, describing the same.*]

[1] In Wisconsin the transfer may be compelled by order of the court upon motion unless there be a bona-fide dispute as to the ownership of the stock. Wis. Stats. 1913 sec. 1752; Com. Exch. Bank. is Kaiser 160 Wis. 199; 151 N. W. 259.

III. [*Allege the transaction by which the plaintiff became the owner of such shares as, for instance, that he received them as collateral security for a loan from the owner, which has not been paid.*]

IV. [*Allege the giving of notice by the plaintiff to the defendant's secretary of his ownership of the stock and a demand that the same be transferred to plaintiff's name on the books; also the refusal to make such transfer.*]

V. [*Allege the value of the stock and the damages which the plaintiff has suffered by reason of the refusal to make the transfer.*]

WHEREFORE [*demand of money judgment.*]

1792. To compel issuance of corporate stock certificate.

I. [*Allege incorporation of the company whose shares are involved in the litigation and that the defendant C.... D.... is the secretary thereof.*]

II. [*Allege that at a certain date, naming it, one E.... F.... owned ..... shares of the capital stock of the corporation and the same stood in his name on the books of said corporation and was represented by certificate No. .... issued by the said corporation on the .... day of ....., 19.. attaching copy of the certificate.*]

III. [*Allege sale and delivery of the shares by E.... F.... to plaintiff for a valuable consideration and indorsement and transfer of the certificate to the plaintiff.*]

IV. That on the .... day of ....., 19.., said plaintiff presented said certificate at the office of the said company to the defendant C.... D...., the secretary thereof, who is by law authorized to make transfers of all stock certificates which had been sold and assigned for surrender, for the purpose of obtaining a new certificate for said shares in his own name, but that said secretary then refused and still refuses to accept the surrender of said certificate and to issue a new certificate for said shares to plaintiff.

WHEREFORE plaintiff prays that the defendant C.... D.... may be required to accept the surrender of said certificate of stock and to issue a new certificate to plaintiff for said .... shares of its capital stock.

[*See note to last preceding form.*]

1793. Outline of complaint to enjoin city from issuing municipal bonds because of illegality.

I. [*Allege that plaintiff is a taxpayer of the city, and brings the action on his own behalf and on behalf of all others similarly situated.*]

II. [*Allege incorporation of the city.*]

III. [*Allege that the defendants personally named are officers of the city.*]

IV. [*Allege that said city officers threaten and are about to issue municipal bonds describing them. If an election has been held on the question allege it and give results.*]

V. [*State under what act or law the city officers claim authority to issue the bonds, and allege why the act is unconstitutional, or if the ground of action is that the law has not been complied with or the legal debt limit exceeded state the facts succinctly.*]

VI. That the plaintiff has no adequate remedy at law.

WHEREFORE [*prayer for permanent injunction against signing, delivering or disposing of the bonds.*]

1794. For redelivery of pledge and an injunction against its sale or transfer (Conn. Pr. Act. form 246).

I. That on ....., 19.., defendant lent to plaintiff ..... dollars.

II. That at the same time plaintiff deposited with defendant ten gold Waltham watches of the value of ..... dollars each, and signed and delivered to him an absolute bill of sale thereof.

III. That said deposit and bill of sale were understood by both parties to be, and were intended for, a pledge of said watches merely, to secure the repayment of said loan with interest.

IV. That on ....., 19.., plaintiff tendered to defendant ..... dollars, in repayment of said loan with interest, and requested defendant to redeliver said watches to him, but defendant refused to accept said tender or to redeliver said watches.

V. That defendant now threatens to sell said watches, claiming them to be absolutely his own under said bill of sale.

VI. That plaintiff has been at all times since said tender, and now is, ready to pay said sum to redeem said pledge.

WHEREFORE plaintiff demands judgment enjoining defendant from selling or otherwise disposing of said watches, and for their delivery to plaintiff upon his paying to defendant or unto court said sum of ..... dollars, and for such other relief as may be just, with costs.

1795. Outline of complaint by corporation against its own director for neglect of duty.

I. [*Allege corporate existence as in Form 848.*]

II. [*Allege election of defendant as director and length of time of service, and allege who were the other directors constituting the board.*]

III. [*Allege the acts by which the corporation has been injured or its property lost or converted, and by whom and when committed, as for instance, the wrongful withdrawal and conversion of corporate funds by other directors or otherwise according to the fact.*]

IV. [*Allege the negligence of defendant and his failure to do his duty as director, as by failing to examine the books, to attend directors' meetings, to call attention of other directors to the facts, etc., as the case may be.*]

V. [*Allege the insolvency of the persons who converted the funds or other facts showing that there is no remedy against them if such be the fact.*]

VI. [*Allege amount of damage.*]

WHEREFORE [*demand judgment for the amount of damages*].

1796. Statutory action to determine boundary lines (Gen. Stats. Minn. 1913 sec. 8095).

I. That plaintiff is the owner of [*describe premises*].

II. That defendant is the owner of adjoining lands, to-wit, [*describe premises*].

III. That the location of the boundary line between said tracts is in dispute between the parties hereto and that the true location thereof depends on the location of one common point, to-wit, the true location of [*name the section, corner or other landmark on the location of which the line depends*].

WHEREFORE plaintiff demands judgment defining and locating such boundary line and for an order establishing a permanent stone or iron landmark for said [*name corner*] and for such order respecting costs and disbursements as to the court may seem just.

1797. Outline of complaint by executor for construction of will.

I. [*Allege death of testator leaving a will and name heir at law, also attach copy of will.*]

II. [*Allege probate of the will appointment and qualification of plaintiffs as executors. Name the devisees, all of whom must be made defendants.*]

III. That in the administration of said estate under said will, and in the execution of the trusts thereby created, questions have arisen as to the true meaning of various clauses thereof, which can only be properly determined by decree of this court, and the plaintiffs are advised that it is necessary to the proper execution of their duties that they be instructed by the court and that said will be construed, and more particularly as follows, viz.:

First, as to the meaning and interpretation of the second paragraph of said will to-wit [*insert same*] and whether the meaning thereof is [*state one interpretation claimed*] or [*state other interpretation*].

Second, [*state fully other questions arising.*]

WHEREFORE the plaintiffs pray the decree of this court construing and interpreting said will in the particulars herein set forth, and for such other relief as may be just and equitable.

1798. By stockholder against business corporation and its directors for misconduct of directors.

I. [*Allege corporate character and business of defendant corporation.*]

II. [*Allege election of the defendant directors and that they assumed the duties of directors and are still such.*]

III. [*Allege the duties of directors as for instance*]: That it was the duty of the said defendants as such directors, honestly, diligently and carefully to administer the affairs of said corporation; to employ none but honest and competent

persons to serve as officers, agents and servants of said corporation, and to take from all persons so employed sufficient security for the faithful performance of their duties; to keep honest, accurate and correct books of account of all the affairs, business and transactions of the said company; to see that the property and effects of the said company were not wasted, stolen or squandered; to make and publish true and accurate accounts and statements of the affairs of the said corporation from time to time as required by statute, and to faithfully and diligently perform all other duties devolving upon them as directors of said company.

IV. [*Allege in what manner the directors failed to perform their duties, as for instance*]: That the said defendants, as directors as aforesaid, utterly failed and neglected to perform their official duties as such directors, as follows: They did not give their care or oversight to the business and affairs of said company, but utterly neglected the same; they did not administer the affairs of the said company in an honest, careful or prudent manner, but, on the contrary, they negligently suffered and permitted the money, property and effects of the said company to be stolen, wasted and squandered; they negligently suffered and permitted the moneys of the said corporation to be loaned to irresponsible persons and corporations without adequate security, by means whereof the said moneys were lost by said corporation.

V. [*Allege the results of the directors' mismanagement as for instance*]: That said directors so negligently and carelessly conducted the said company and the business and affairs thereof, that the entire capital, surplus, property and effects of the said company were lost and the stock of the said company rendered worthless, and the stockholders of the said bank rendered liable for a large and considerable sum of money on account of the debts of the said company remaining unpaid.

VI. That before the commencement of this action the plaintiff requested and demanded of the said defendant corporation, through its officers, that it should commence and prosecute an action against the aforesaid directors of the ..... Company to recover against them the damages which the said corporation or the stockholders thereof have sustained by reason of the negligence and official misconduct of the said directors; that the said defendant corporation neg-

lected and refused to commence such action, or any action, against the said directors, or any or either of them.

VII. That this action is commenced and prosecuted by this plaintiff on his own behalf, and on behalf and for the benefit of all the other stockholders of said company.

WHEREFORE the plaintiff demands judgment that the damages sustained by said corporation by reason of the premises be determined, and that the defendants [*naming the directors*] be adjudged to pay said sum to the defendant corporation and that such further judgment be rendered herein as may be just and equitable.

[*For form of complaint by minority stockholders suing on behalf of the corporation to collect sums due the corporation which the directors refuse to collect, see Just. vs. Idaho Canal 16 Idaho 639; 102 Pac. 381.*]

1799. Complaint by receiver of foreign mutual insurance company to recover an assessment on premium note.

I. [*Allege corporate character and business of the foreign insurance corporation and its authority under the law to transac ıa fire insurance business on the mutual plan and to accept from the insured premium notes.*]

II. [*Allege that by the laws of the state in which the insurance company was incorporated all persons insured become members of the company and are legally bound to pay for losses and necessary expenses in proportion to the original amount of the premium note given.*]

III. [*Allege that by the laws of said state the company is permitted to do insurance business and issue policies in other states, and also that the said company complied with the laws of the state when the action is brought relating to its admission to do business in that state, giving the date of such compliance.*]

IV. That thereafter, to-wit, on the .... day of ....., 19.., the above named defendant made application in writing to become a member of said insurance company, and for certain insurance upon its property situated at ....., in ..... county, Wisconsin; that said application was accepted by said insurance company, and it thereupon issued to the defendant its certain insurance policy dated said day, signed by its president and secretary, sealed with its seal, and coun-

tersigned by its authorized state agents, numbered ...., insuring the said defendant against loss or damage by fire and lightning of and to the property therein described, and delivered the same to the defendant.

V. That, thereupon, at the same time, in consideration of such policy, the said defendant made, executed and delivered to the said [*name insurance company*] its certain premium note, dated the .... day of ....., 19.., whereby the said defendant promised to pay to said insurance company the sum of five hundred dollars, by such installments and at such times as the directors of said company should assess and order, pursuant to the charter and by-laws of the said company, and it was expressly agreed therein that said note should not be transferable and that defendant's liability thereon should only be for the losses and expenses incurred by the said insurance company and should not extend beyond the face amount thereof, a copy of which said note is hereto attached marked Exhibit "A" and made part of this complaint.

VI. That during the life of said policy of insurance and while said defendant was a member of said insurance company losses and expenses were incurred by said insurance company to a large amount; that the just proportion of the same chargeable to the defendant under the provisions of said note and agreement exceeded the amount of said premium note, and that the directors thereupon duly levied certain assessments on said note to the amount of ..... dollars, which the defendant has paid.

VII. [*Allege the bringing of the action in the foreign state in which the plaintiff was appointed receiver and allege such appointment and qualification and plaintiff's entry in the discharge of his duties.*]

VIII. That thereafter said policy of insurance issued to defendant was canceled, pursuant to the laws of the said state of ....., and said defendant notified thereof.

IX. That on the .... day of ....., 19.., the plaintiff as such receiver in conformity with his duty under said judgment and as prescribed by the laws of said state, duly filed in said ..... court a report of the assets and liabilities of said [*name insurance company*], which he had duly ascertained; and that it was then necessary to pay the just losses and expenses of said [*insurance company*] and the expenses

of winding up its affairs, to assess upon the premium notes thereof held by said company at the time of the dissolution thereof, and by this plaintiff as receiver thereafter, the whole amount not previously assessed thereupon, up to their face value.

X. That said court upon hearing said report and filing the same, by its order duly made and entered of record, duly ordered and required the plaintiff to make an assessment upon the deposit notes, premium notes and contingent liabilities due said [*insurance company*] sufficient to meet the actual liabilities of said [*insurance company*] and the reasonable expenses of winding up its affairs.

XI. That the said court further by said order directed and required the plaintiff to collect the amounts so assessed, and to institute and prosecute all actions and proceedings in law or equity that might be necessary to collect the same.

XII. [*Allege that by the laws of said state the receiver succeeds to the property of the company and is empowered to make assessments on premium notes and collect the same by action.*]

XIII. That by the laws of said state and the judgment of said court, the said note given by the defendant as hereinbefore set forth passed among others to this defendant by operation of law as fully as if the same had been assigned.

XIV. That at the time the said premium note passed to the plaintiff as receiver as aforesaid, there was and still remains unpaid thereon the sum of ..... dollars.

XV. That in pursuance of the aforesaid order the plaintiff duly levied an assessment upon all the premium notes not previously assessed up to their face value and levied and assessed upon the said note so given by the defendant as aforesaid the sum of ..... dollars, the same being the full amount thereof not previously assessed, and on the .... day of ....., 19.., duly notified said defendant of such assessment, by mailing a written notice of the same addressed to him at ..... in said state of ....., the same being his postoffice address, duly postpaid; such notice being given in the substance and manner prescribed by and made sufficient by the laws of said state and the by-laws of said corporation and the terms of said agreement of insurance above set forth; which said notice required him to pay the amount so assessed within thirty days from the date thereof.

XVI. That said amount so assessed is no more than the just proportion of the losses and expenses incurred by said company during the life of said policy, justly chargeable to the defendant; and that the same has not been paid, though more than thirty days have elapsed since such notice was given, and to pay the same or any part thereof the defendant has refused and still refuses.

WHEREFORE the plaintiff, as such receiver demands judgment against the defendant for the sum of ..... dollars, with interest thereon since ....., 19.., together with the costs and disbursements of this action.

1800. Complaint under mill dam act by land owner whose lands are flowed (Wis. Stats. 1913 sec. 3378 et seq.).

I. [*Allege plaintiff's ownership of the lands flowed giving description of the same.*]

II. [*Allege the existence of a non-navigable stream running through the premises.*]

III. That during the month of ....., 19.. the defendant without the consent of or authority from the plaintiff, or any one with power to give the same, erected and has ever since maintained a dam across said stream, about ..... below the said premises of the plaintiff, and of a great height, to-wit [*state height*]; that said dam was so erected and is so maintained to raise water for the purpose of producing power to run and work a water mill, namely, a flour mill [*or, specify the kind of mill*]; that the lands under and adjoining said mill and mill dam and used therewith are described as follows: [*describe same*]: that by means of said dam since said last mentioned date, the defendant has obstructed the natural flow of said water and dammed up said stream, and without grant or consent from the plaintiff, caused the waters of said stream to set back upon and overflow the plaintiff's said land and over a large part of the premises above described.

IV. That the lands so overflowed by the raising and maintenance of said dam, at the ordinary stage in the pond caused by said dam, are the following: [*Here describe accurately, the lands overflowed.*]

V. That the plaintiff is thereby deprived of all beneficial use of said land and of the crops of hay, grain and vegetables, and pasturage that might otherwise be raised and had thereon; [*here allege fully what the effect of the flowage is*], and that the portions of said premises not actually covered with water by said overflowing are otherwise specially injured as follows, to-wit: [*here specify full particulars of such injury.*]

VI. That the damages to the plaintiff's land so overflowed are the sum of ..... dollars; and to his other lands not overflowed but otherwise injured, are the sum of ..... dollars.

VII. That said dam is kept up and closed without necessity, during the whole year at an unreasonable height. [*Here state facts showing such to be the case.*]

WHEREFORE, the plaintiff demands judgment for ..... dollars, the damages he has sustained as aforesaid by reason of the premises, from the .... day of ....., 19.., until the rendering of the verdict in this action, and further that if the defendant is allowed to keep up and maintain said dam at its present height, then that the plaintiff have as annual compensation such sum as shall be just and reasonable for the damages that shall thereby be hereafter sustained by the plaintiff, or such sum in gross as may be a just and reasonable compensation for the damages as will after such verdict be occasioned by said dam so long as used in conformity with the verdict that may be rendered herein.

Plaintiff further demands that the facts may be determined as to the reasonableness of the height of said dam and as to the time during the year when such height should not be maintained, and for his costs.

1801. Complaint in action to condemn land for public use by municipal corporation.[2]

I. That the name of the plaintiff in charge of the public use hereinafter named is the county [*or* city] of ..... in the state of ..... and that the plaintiff is a municipal corpora-

[2] This and the immediately following form may be used in California, Arizona, Montana, North Dakota, and Utah. Cal. C. C. P. 1906 sec. 1244; Ariz. R. S. 1913 sec. 3082; Mont. Rev. Codes 1907 sec. 7337; N. Dak. Rev. Codes 1905 sec. 7592; Utah Comp. Laws 1907 sec. 3594. In Idaho there must be added (in case the owner of the lands resides in the same county) a statement that the plaintiff has sought in good faith to purchase the lands sought to be taken, or to

tion duly created and existing under the laws of said state.

II. That A.... B.... the defendant named in this action is the sole owner and claimant of the property sought to be condemned herein, to-wit, [*describe property*]. [*Or allege that the names of the owners are unknown.*]

III. That on the .... day of ....., 19.., the board of supervisors of said county [*or otherwise state the governing body of the corporation according to the fact*], by its order duly made for that purpose, authorized the building of an extension to the county court house [*or otherwise state the public use*] and directed that the district attorney of said county institute condemnation proceedings to obtain title to the lands above described for the purpose of building said extension thereon.

IV. That said lands and the whole thereof are necessary for the public use, namely, for the erection of said extension to the county court house thereon.

V. That the said county board [*or* city council] on the .... day of ....., 19.. awarded to the said [*name defendant*] as the purchase price of said lands the sum of ..... dollars which plaintiff alleges to be the reasonable value of said land, but the said defendant has refused and now refuses to accept said amount so awarded and refuses to grant title of said lands for said public use.

WHEREFORE plaintiff prays that said land be condemned for said public use, to-wit, [*describe same*], that the damages of the defendant be assessed for the taking of said lands and for such other and further relief as may be just.

1802. The same by railroad corporation.

I. [*Allege the corporate character and name of the plaintiff.*]

II. [*Allege the purpose and business of the plaintiff, showing that its purpose is to construct a railroad or an extension of an existing line, and the general direction thereof and*

settle with the owner for the damages which might result to his property from the taking thereof, and was unable to make any reasonable bargain therefor or settlement of such damages. Idaho Rev. Codes 1908 sec. 5216.

In most of the states the proceeding is by petition. Forms may be found in the following cases. Trester v. M. P. Ry. Co. 33 Neb. 171, 49 N. W. 1110; St. L. Ry. Co. v. Lewright 113 Mo. 660, 21 S. W. 210; K. C. etc. Ry. Co. v. Stony 96 Mo. 611, 10 S. W. 320; City v. Houck 129 Mo. 607, 31 S. W. 933. See also Chapter CLXV post.

terminal points, also that the road has been surveyed and definitely located over the land sought to be condemned.]

III. [*Describe with particularity the location of the proposed road or extension, attaching an exact map thereof.*]

IV. [*Describe with accuracy every tract of land sought to be taken and whether the same includes the whole or only a part of an entire tract, also state the claimed ownership of each tract showing that the defendants are such claimants. If the ownership of any parcel is unknown, state the fact and pray that when the names of such unknown owners are discovered they may be inserted by amendment.*]

V. [*Allege that it is necessary for the public use that the lands be taken for railroad purposes, that none of it has previously been appropriated for any public use, and that the plaintiff's railroad has been located in the manner which will be most compatible with the public good and work the least private injury.*]

WHEREFORE [*Prayer for judgment that the damages be ascertained including the value of the land actually taken, the improvements and the damages to the remainder of the parcels not actually taken, that the benefit to the remainder be ascertained and deducted from the damages, that the cost of necessary fences and cattle guards be ascertained and that judgment of condemnation be entered, etc.*]

1803. To enjoin members of a labor union from conspiracy to boycott and from picketing.

[*See complaint sustained and reported in substance in Goldberg vs. Stablemen, 149 Cal. 429, 86 Pac. 806.*]

[*See also complaint sustained and reported in substance in Crescent F. Co. vs. Union, 153 Cal. 433, 95 Pac. 871.*]

1804. By riparian owner of lands in various counties to restrain diversion of waters of a river flowing through the lands, and to recover damages for past diversions.

[*See complaint reported in substance in Miller vs. Madera I. Co., 155 Cal. 59, 99 Pac. 502.*]

1805. To restrain diversion of surface and percolating waters, resulting in damage to plaintiff's orchard.

[*See complaint and findings of court in Miller v. Bay Cities W. Co., Cal. 107 Pac. 115.*]

1806. To establish right to the use of pipe line for irrigating purposes across defendant's land and enjoin interference therewith.

[*See complaint reported in substance in Collins vs. Gray, 154 Cal. 131, 97 Pac. 142.*]

1807. Complaint in equity by owner of land to restrain defendants from damming a river, digging irrigating ditches, and trespassing on plaintiff's lands.

[*See complaint sustained and reported in full in Waddingham vs. Robledo 6 New Mex. 347, 28 Pac. 663.*]

1808. Complaint by married woman as a sole trader.[3]

I. [*Allege marriage.*]

II. That on the .... day of ....., 19.., by a decree of the ..... court of ..... county in this state duly given, the plaintiff was decreed to be a sole trader, and that at the times hereinafter mentioned she was and still is such sole trader, carrying on business as a ..... at .....

III. [*Set out cause of action arising out of the business, as if the suit were brought by a man, being careful to plainly and unmistakably allege that the contract is chose in action was acquired by the plaintiff in her business as a sole trader and still remains her sole and separate property.*]

WHEREFORE, etc.

1809. Complaint in action against a married woman as sole trader.

I. That the defendant is the wife of one E.... F....

II. [*Allege the decree authorizing the defendant to do busi-*

[3] Cal. C. C. P. 1906 sec. 1813 *et seq.* Idaho Rev. Codes 1908 sec. 5850 *et seq*; Mont. Rev. Codes 1907 sec. 7375 *et seq.*

ness as a sole trader substantially as in paragraph II of last preceding form.]

III. [*Set out the cause of action as if the action were against a man, showing, however, the fact that the cause of action arose out of the business in which defendant was engaged as a sole trader.*]

WHEREFORE, etc.

1810. By pledgor of goods, to obtain an accounting and for an injunction restraining their sale (precedent in Castoriano v. Dupe, 145 N. Y. 250).

I. That on the .... day of ..... the plaintiff executed and delivered to the defendant a bill of sale, absolute on its face, of [*describe property*], as collateral security for an indebtedness then owing by plaintiff to defendant, the amount of which debt was at that time undetermined and still remains undetermined, but plaintiff alleges that it does not exceed ..... dollars.

II. That the defendant now claims the absolute ownership of said property and claims that the amount of said indebtedness exceeds ..... dollars, and plaintiff alleges that an accounting is necessary to ascertain the true amount of the debt for which said goods are pledged.

III. That said property is of a peculiar character [*describe it*] that the same can only be sold to comparatively few customers and that if sold at auction it would be sacrificed and would produce far less than its real value.

IV. That the plaintiff on the .... day of ....., 19.., tendered to the defendant ..... dollars to redeem said property, which sum fully covers said indebtedness, and has kept said tender good and now offers to bring said money into court for the defendant's benefit as the court shall order. That the defendant refused to accept said tender and has advertised said property for sale and threatens to sell the same at auction to the lowest bidder, on the .... day of ....., 19..

V. That plaintiff is ready and willing to pay defendant whatever sum may be adjudged due to him upon an accounting upon said indebtedness, and that he has no adequate remedy at law.

WHEREFORE [*demand for judgment that the bill of sale be declared a collateral mortgage; that an accounting be had that upon payment of the amount found due the defendant restore the goods, and that he be enjoined from selling the same, etc.*]

1811. For forcible entry and unlawful detainer (Cal. C. C. P. 1906 sec. 1159).[4]

I. That at the times hereinafter named the plaintiff was in lawful possession of [*describe premises*], and of the dwelling house [*or other buildings describing same*] thereon.

II. That on the .... day of ....., 19.. the defendant forcibly entered on said premises and ejected the plaintiff from said house and premises [*if property damage was committed state what*] to the plaintiff's damage in the sum of ..... dollars. [*If the entry was peaceful, vary the foregoing allegation to suit that fact, and allege that after such entry the defendant forcibly ejected the plaintiff, or if the ejection was by threats state the facts.*]

III. That the defendant unlawfully withholds from plaintiff the possession of said premises, and has so held possession of the same at all times since the said .... day of ....., 19.. [*If the detainer is forcible or by threats of violence vary the allegation by so charging the fact.*]

IV. That by reason of the premises the plaintiff has been deprived of the rents, issues and profits of said premises from ....., 19.. to ....., 19.. amounting to ..... dollars. [*If damage has been suffered by injury to property, or otherwise, allege the facts and the amount of damage resulting.*]

WHEREFORE, etc.

1812. For forcible detainer (Cal. C. C. P. 1906 sec. 1160).

I. [*Allege that plaintiff was actually and peaceably in possession and lawfully entitled to the possession of the premises, describing them, at the time hereinafter mentioned and for five days previous thereto.*]

[4] In most of the code states actions of unlawful detainer must first be brought in justice court, and as this work is not intended to include forms for that court no attempt is here made to fully cover the subject. In California, however, and some other states which have followed her lead, the action may be brought in some of the higher courts and this form and the two succeeding forms are inserted for that reason.

II. That the defendant took possession of said premises on the .... day of ....., 19.. and from that time until the present has maintained and still maintains such possession by force and with a strong hand, [*or* by menaces and threat of violence against the plaintiff and his agent.] [*If the defendant took possession in the night time, or during plaintiff's absence, allege that fact; in such case it is not necessary to allege forcible holding or threats of violence but there must be added an allegation of a five day demand for possession as follows*]:

III. That on the .... day of ....., 19.. at ..... the plaintiff made a written demand on the defendant to surrender possession of said premises, but the defendant refused for the period of five days thereafter and still refuses to surrender such possession but on the contrary still remains in possession thereof.

IV. That by reason of the premises the plaintiff has been deprived of the rents, issues and profits of said premises to his damage ..... dollars [*if other damage has been suffered state it*].

WHEREFORE, etc.

1813. For unlawful detainer holding over after rent due (Cal. C. C. P. 1906 sec. 1161).

I. [*Allege the making of the lease, its terms and that defendant went into possession and still holds possession under it, attaching a copy if desired.*]

II. [*Set forth the payments of rent which are due and unpaid their amount and exact dates due.*]

III. That on the .... day of ....., 19.. and within one year after said rent became due, as aforesaid, the plaintiff made demand in writing upon the defendant that he pay said rent or surrender possession of said premises within three days thereafter, but said defendant neglected and refused and has for the space of ..... days neglected and refused to deliver up possession of said premises or to pay said rent, and that said rent still remains due and unpaid; that a copy of said demand is hereto annexed and made part of this complaint.

IV. That said defendant still withholds possession of said premises without payment of rent and without the

plaintiff's permission, to the plaintiff's damage ..... dollars.

WHEREFORE plaintiff demands judgment for the restitution of said premises, for the sum of ..... dollars rent due as aforesaid, also for the sum of ..... dollars for waste and for the detention of said premises, and that said damages and rent money be trebled, and for costs.

1814. Complaint in unlawful detainer (Ark. Dig. of Stats. 1904 sec. 3634).

[*Title.*]

Now comes the plaintiff A.... B.... and states:

I. That he is the owner and lawfully entitled to the immediate possession of the following described real estate [*describe same*] and the improvements thereon.

II. [*If the defendant be a tenant holding after non-payment of rent.*] That defendant entered into possession of same on the .... day of ....., 19.., under an agreement to pay as rent therefor the sum of ..... dollars per month, and is still in possession thereof. That defendant failed and neglected to pay the rent due on the .... day of ....., 19.., to-wit the sum of ..... dollars, and still refuses and neglects to pay the same although three days' notice to quit and demand for the surrender of the possession of said premises has been made in writing by the plaintiff [*or his agents naming them*], copies of which notice and demand are attached hereto marked Exhibit A. That the defendant has refused and neglected to surrender possession of said premises notwithstanding the service of the aforesaid notice upon him but still holds the same and unlawfully detains the same from the plaintiff.

[*If the entry or detention was forcible the immediately preceding forms given for use in California may be consulted for the proper allegations.*]

III. That the defendant is indebted to the plaintiff in the sum of ..... dollars for rent due and unpaid and that plaintiff has been damaged by defendant's unlawful detention of said premises in the sum of ..... dollars.

WHEREFORE the plaintiff prays judgment for the possession of said property, and that he recover from the defendant the sum of ..... dollars as rent and damages for unlawful detainer thereof, and for all rents and such further damage as may accrue pending this suit, and for all proper relief.

Attorney for Plaintiff,
L.... M....

C.... D.... states that he is the agent of A.... B...., plaintiff, and that the facts set forth in the foregoing statement are true and correct.

L.... M....

[*Jurat.*]

Affidavit.

I, E.... F...., do solemnly swear that A.... B.... is lawfully entitled to the possession of [*describe premises*] now occupied by Y.... Z.... the defendant herein, and that he unlawfully detains the same after lawful demand thereof, made in writing.

E.... F....

[*Jurat.*]

1815. Complaint by receiver of insolvent corporation to recover assessment on the stock against one who transferred his stock to an insolvent third person.

[*See complaint sustained and reported in substance in N. W. Trust Co. vs. Bradbury, 112 Minn. 76; 127 N. W. 386.*]

1816. Complaint by assignee in bankruptcy of insolvent corporation against a stockholder who has withdrawn, to recover the amount received from the corporation on such withdrawal.

[*See Preiss vs. Lins, 122 Minn. 441; 142 N. W. 822.*]

1817. Complaint by corporation employer to set aside award of Industrial commission under Workmen's Compensation act (Wis. Stats. 1913 sec. 2394–19; N. W. Fuel Co. v. Leipus, 161 Wis.—)

I. That the above named plaintiff, and the above named defendant, Industrial Commission of Wisconsin, are and each of them is a corporation duly organized and existing under and by virtue of the laws of the state of Wisconsin.

II. That on ....., 19.., the above named defendant, C.... D...., sustained an injury to his left arm while in the employ of said plaintiff; and that on said date said plaintiff and said C.... D.... were subject to the provisions of sections 2394–3 to 2394–31 inclusive of the Wisconsin statutes known as the Workman's Compensation Act.

III. That on ....., 19.., said defendant, Industrial Commission, made and filed findings of fact and an award, wherein and whereby it directed that said plaintiff pay to said defendant, C.... D.... the sum of ..... dollars as compensation for said injury, in addition to the sum of ..... dollars already paid by said plaintiff to said defendant C.... D.... as compensation for said injury.

IV. That among other things said Commission found (1) that the injury sustained by said defendant C.... D.... was one included within the following paragraph of subsection 5 of section 2394–9 of said act, to-wit: "In all other cases in this class the compensation shall bear such relation to the amount stated in the above schedule as the disabilities bear to those produced by the injuries named in schedule"; and (2) that said injury entitled said C... D... to the compensation provided by said act under the schedule of fixed benefits contained in said sub-section 5 of section 2394–9 thereof.

V. That said Commission determined that the compensation so payable as a fixed benefit should be paid in addition to the amount found to be due and payable on account of the total disability caused by said accident and in addition to said amount of ..... dollars already paid by said plaintiff.

VI. That in making such determination said Commission acted without and in excess of its powers; and that its said findings of fact do not support said award.

WHEREFORE, plaintiff demands judgment that said award be set aside and that plaintiff have such other and further relief as to the Court may seem just and proper.

1818. The same (precedent in Milwaukee C. & G. Co. v. Industrial Commission et al., 160 Wis. 247; 151 N. W. 245).

I. That the plaintiff is and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the state of Wisconsin, engaged in the manufacture of coke and the by-products thereof and the business incidental thereto at Milwaukee, in the county of Milwaukee, and state of Wisconsin.

II. That the defendant, Industrial Commission of Wisconsin, consisting of E.... F...., G.... H...., and J.... K...., is charged among other things with the administration of the provisions of Chapter 50, Laws of Wisconsin, 1911, as amended by Chapter 599, Laws of Wisconsin, 1913, and that the defendant C.... D.... is and at all times hereinafter mentioned was a resident of the city of Milwaukee, county of Milwaukee and state of Wisconsin, and was on the 15th day of December, 1912, the wife of the L.... D.... hereinafter mentioned.

III. That heretofore, to-wit, on ....., 19.., said plaintiff had in its employ one L.... D...., the husband of the said defendant, C.... D...., and that on said last mentioned date the plaintiff and said L.... D.... were both under and subject to the provisions of Chapter 50, Laws of Wisconsin, 1911.

IV. That on or about the 12th day of September, 1913, said defendant, C.... D.... by petition duly filed with the Industrial Commission alleged among other things that said L.... D.... had sustained a personal injury at the coke plant of said plaintiff and while in its employ on the .... day of ....., 19..; that thereafter, to-wit, on the .... day of ....., 19.., said L.... D.... died as a result of said injuries and said C.... D.... thereupon in said petition made application for compensation under the provisions of Chapter 50, Laws of Wisconsin, 1911.

V. That thereafter, to-wit, on the .... day of ....., 19.., issue having been joined, a hearing of said application was duly held in the City of Milwaukee before said defendant, Industrial Commission of Wisconsin, and that thereafter, to-wit, on the .... day of ....., 19.., said defendant, Industrial Commission of Wisconsin, by E....

F...., G.... H.... and J.... K...., commissioners, duly made and filed its findings of fact and award as follows, to-wit: [*insert copy*].

VI. Plaintiff further alleges that in so making the findings of fact as aforesaid said defendant, Industrial Commission of Wisconsin, acting by and through said commissioners, acted without or in excess of its powers.

VII. Plaintiff further alleges that in the making and filing of its award as aforesaid the defendant, Industrial Commission of Wisconsin, acting by and through said commissioners, acted without or in excess of its powers.

VIII. Plaintiff further alleges that the findings of fact so made and filed by said defendant, Industrial Commission of Wisconsin, acting by and through said commissioners, as aforesaid, do not support the award and order made in favor of said defendant, C.... D...., as aforesaid.

WHEREFORE the plaintiff demands that the aforesaid order and award be reviewed by this honorable court and that the same be set aside and judgment be entered in favor of the plaintiff, and that such other and further relief be accorded said plaintiff as to the court may seem just and proper, together with the costs and disbursements of this action.

1819. The same, by municipal corporation (precedent in Superior v. Industrial Commission; 160 Wis. 541; 152 N. W. 151).

I. That the plaintiff is a municipal corporation and city in ..... county, Wisconsin.

II. That the defendants E.... F...., G.... H.... and J.... K.... are and constitute the Industrial Commission of Wisconsin.

III. That the defendant C.... D.... was, in a hearing held by the Industrial Commission, on the .... day of ....., 19.. awarded a judgment and award against the city of ....., dated ....., 19.., in the sum of ..... dollars, with direction that the same be paid by the city within thirty days.

IV. That said award and judgment was for and on account of the death of L.... D...., the husband of the defendant C.... D...., claimed to have been caused by and

the result of an accident to the said L.... D.... claimed to have been sustained while he was in the employ of and working for the city of .....

V. The plaintiff alleges the fact to be that the said L.... D...., if he was injured as alleges, was not in the lawful employment of or legally working for the defendant city of ....., and that such injuries and death were not sustained while said L.... D.... was so lawfully employed by or performing duties or services under his employment for the city of ..... and that the city of ..... was not in any way to blame or liable for the accident, injury or damage to him.

VI. Plaintiff further alleges that when the said L.... D...., who was mowing private lawns in the street in front of lots of private individuals and without the knowledge of or authority from the city of ..... or any officer or employee having any authority to so employ him or charge the city with such services or liability for injuries sustained while performing such services, and that such mowing was being done not only without any authority but in violation of the ordinances, resolutions and regulations of the city of ....., and that the work done was not work of or for the city of ....., and that the city of ..... was not liable for such services or responsible, under the Industrial Commission law or any other law, for the acts of said L.... D.... or any accident or injury that might happen to him while engaged in the work he was performing at the time of said alleged accident.

VII. That neither the city of ....., nor any officer or employee of the city had any authority to employ said L.... D.... to do such work or to make the city liable for the accident or death of said L.... D...., and that the award of said Industrial Commission was and is excessive, illegal and unauthorized by law.

WHEREFORE plaintiff demands judgment that said award be reviewed, vacated and set aside.

1820. Complaint against principal and agent for relief against one or the other in the alternative (Wis. Stats. 1913 sec. 2603 as amended by Chap. 219 Laws 1913) (Conn. Practice Forms No. 15).

I. That on ....., 19.., the defendant C.... D.... represented to the plaintiff that he was authorized by the defendant E.... F.... to select and employ an editor for a newspaper published at ..... called the ..... then owned by said E.... F.... at a salary of ..... dollars and thereupon requested the plaintiff to accept such position at said salary, for the year beginning ....., 19..

II. That the plaintiff believing such representations to be true on said day accepted the said proposition.

III. That on ....., 19.. the plaintiff went to ..... to enter upon the duties of said position when the defendant E.... F.... refused to permit him to do so and told him that said C.... D.... had no authority from him to make such contract.

IV. That the plaintiff was then and at all times during the ensuing year ready and willing to fulfill the duties of said position.

V. That by reason of the breach of the said contract the said plaintiff has been damaged in the sum of ..... dollars.

WHEREFORE the plaintiff demands judgment for the sum of ..... damages as aforesaid from the said E.... F...., or in case it be shown that the said C.... D.... in fact acted without authority from said E.... F.... then he claims said damages from the said C.... D....

PART III

FORMS OF DEFENSES

CHAPTER LXXXIII.

DEMURRERS.

1821. Outline form of demurrer to complaint.
1822. General demurrer to complaint. (Wisconsin.)
1823. Demurrer for want of jurisdiction of the person. (Wisconsin.)
1824. Demurrer for want of jurisdiction of the subject. (Wisconsin.)
1825. Demurrer for incapacity to sue. (Wisconsin.)
1826. For pendency of another action. (Wisconsin.)
1827. For defect of parties. (Wisconsin.)
1828. Demurrer for misjoinder of causes of action. (Wisconsin.)
1829. Demurrer based on statute of limitations. (Wisconsin.)
1830. Demurrer to defense in answer. (Wisconsin.)
1831. Demurrer to counterclaim. (Wisconsin.)
1832. Demurrer to reply. (Wisconsin.)
1833. Demurrer to complaint for insufficiency. (Minnesota.)
1834. The same, another form.
1835. Other forms of demurrer. (Minnesota.)
1836. Demurrer to defense in answer. (Minnesota.)
1837. Demurrer to counterclaim. (Minnesota.)
1838. Demurrer to petition. (Iowa.)
1839. General demurrer to petition in equity. (Iowa.)
1840. Demurrer to defense in answer. (Iowa.)
1841. Demurrer to counterclaim. (Iowa.)
1842. Demurrer to reply. (Iowa.)
1843. Demurrer to complaint. (North Dakota and South Dakota)
1844. Demurrer to answer. (North Dakota and South Dakota.)
1845. Demurrer to petition. (Nebraska.)
1846. Demurrer to defense in answer. (Nebraska.)
1847. Demurrer to counterclaim or set-off. (Nebraska.)

The demurrer is simply a challenge to the legal sufficiency of the pleading to which it is addressed. At common law a demurrer was called general when it was based on the ground that the facts stated were insufficient to constitute a cause of action, and special when based upon some defect of form of the pleading. The code, however, has generally abolished any such distinction in name, and has provided certain causes for which demurrers will lie, and a demurrer cannot be successfully interposed except for a cause specified in the statute. Notwithstanding this fact, the demurrer for in-

sufficiency of facts is still quite universally called a general demurrer.

A demurrer cannot properly state facts; it will only lie for defects appearing on the face of the pleading demurred to; resort cannot be had either to evidence or other pleadings to help out the pleading attacked; it will not lie to a mere fragment of a pleading, but must be addressed to an entire pleading, or an entire count or separate cause of action; it operates also as an admission of all material facts well pleaded, but not as an admission of mere inferences from facts or conclusions of law. It may be based upon any or all of the statutory grounds, but when several grounds are relied upon they should be numbered and stated separately. The prayer for relief cannot be demurred to, nor is it ground for demurrer that more relief is prayed for than the plaintiff is entitled to.

The statutes governing demurrers are quite similar in the various states, although there are some substantial differences in the grounds upon which demurrers may be based. The various statutes are cited in the note.[1]

[1] Wis. Stats. 1913 sec. 2649; Ariz. R. S. 1913 sec. 468; Ark. Dig. of Stats. 1904 sec. 6093; Cal. C. C. P. 1906 sec. 430; Colo. Code Ann. 1911 sec. 56; Idaho Rev. Codes 1908; Iowa Ann. Code 1897 sec. 3561; Kans. Gen. Stats. 1909 sec. 5686; Mont. Rev. Codes 1907 sec. 6534; Minn. Gen. Stats. 1913 sec. 7754; Mo. R. S. 1909 sec. 1800; Neb. R. S. 1913 sec. 7666; N. Dak. Rev. Codes 1905 sec. 6854; S. Dak. C. C. P. 1908 sec. 121; Okla. Comp. Laws 1909 sec. 5629; Oregon Laws 1910 sec. 68; Utah Comp. Laws 1907 sec. 2962; Wash. Rem. and Bal. Code 1910 sec. 259; Wyo. Comp. Stats. 1910 sec. 4381.

The substantial differences in the various code provisions cited are indicated in the following summary, viz, demurrer may be based upon the ground:

(a) That the court has no jurisdiction of the person of the defendant. (In all the states except Arizona.)

(b) That the court has no jurisdiction of the subject of the action. (In all the states.)

(c) That the plaintiff has not legal capacity to sue. (In all the states.)

(d) That there is another action pending between the same parties for the same cause. (In all the states.)

(e) That there is a defect of parties, plaintiff or defendant. (In all the states except Kansas.)

(f) That there is a misjoinder of parties, plaintiff or defendant. (In California, Colorado, Idaho, Montana, Utah and Wyoming.)

(g) That a party plaintiff or defendant is not a necessary party to a complete determination of the action. (In Missouri.)

(h) That several causes of action have been improperly united. (In all the states except Arkansas, Iowa and Kansas.)

(i) That separate causes of action against several defendants are

1821. Outline form of demurred to complaint.

[*Title.*]

The defendant demurs to the complaint [*or* petition] herein on the ground that it appears on the face thereof that [*here state the specific ground of demurrer.*]

1822. General demurrer to complaint (Wis. Stats. 1913 sec. 2649).

[*Title.*]

The defendant [*or if only part of the defendants demur:* the defendants, *naming the demurrants*, demur] demurs to the complaint herein [*or*, to the first, *or* second, *or other*, cause of action stated in the complaint herein] on the ground that it appears upon the face thereof* that the same does not state facts sufficient to constitute a cause of action.

E.... F....,
Defendant's Attorney,
..... Wis.

1823. Demurrer for want of jurisdiction of the person (Wisconsin).

[*Add to last preceding form, or substitute at* *] that the court has no jurisdiction of the person of this defendant [*or*, these defendants].

1824. Demurrer for want of jurisdiction of the subject (Wisconsin).

[*Add to first form in this chapter, or substitute at* *] that the court has no jurisdiction of the subject of the action.

improperly joined. (In Wyoming.)

(j) That the complaint does not state facts sufficient to constitute a cause of action. (In all the states except Iowa.)

(k) That the facts stated in the petition do not entitle the plaintiff to the relief demanded. (In Iowa.)

(l) That the complaint is ambiguous, or unintelligible, or uncertain. (In California, Colorado, Idaho, Montana and Utah.)

(m) That the action was not commenced within the time limited by law. (In Wisconsin, Arizona, Oregon and Washington.)

(n) That the petition, on the face thereof, shows the cause of action is barred by the statute of limitations; or fails to show it to be in writing, where it should be so evidenced; or, if founded on an account or writing as evidence of indebtedness, that neither such writing or account, or a copy thereof, is incorporated into or attached to the pleading, or a sufficient reason stated for not doing so. (In Iowa.)

1825. Demurrer for incapacity to sue (Wisconsin).[2]

[*Add to first form in this chapter, or substitute at* *] that the plaintiff has not legal capacity to sue in this, that [*here state particularly the defect, as for instance:* the plaintiff is a minor under the age of twenty-one years, and no guardian *ad litem* has been appointed for the purposes of this action].

1826. For pendency of another action (Wisconsin).

[*Add to first form in this chapter, or substitute at* *] that there is another action pending between the same parties for the same cause.

1827. For defect of parties (Wisconsin).[3]

[*Add to first form in this chapter, or substitute at* *] that there is a defect of parties plaintiff [*or* defendant] by reason of the omission of [*here designate the omitted party either by name or by the character in which he is described in the complaint, e. g.*]*:* the husband of the plaintiff.

1828. Demurrer for misjoinder of causes of action (Wisconsin).

[*Add to first form in this chapter, or substitute at* *] that several causes of action have been improperly united. [*This general statement seems sufficient under Wis. Stats. 1913 sec. 2651; if it is deemed best to state the defect specifically it may be easily done by adding to the foregoing:* as follows, to-wit, the first cause of action in said complaint being for breach of a contract of employment, and the second cause of action being in tort to recover for an assault upon the person, *or otherwise according to the fact.*]

[2] When the demurrer is based upon this ground the defect relied upon must be particularly stated. Wis. Stats. 1913 sec. 2651.

[3] The defect must be particularly stated if the demurrer be based upon this ground. Wis. Stats. 1913 sec. 2651; Gunderson v. Thomas, 87 Wis. 406; 58 N. W. 750. This demurrer only lies for a deficiency, not for an excess of parties, except in the single case of joining the wife as a plaintiff where she has no interest in the action. Read v. Sang, 21 Wis. 678; G. W. Co. v. Insurance Co., 40 Wis. 373.

1829. Demurrer based on statute of limitations (Wisconsin).

[*Add to first form in this chapter, or substitute at* *] that the action was not commenced within the time limited by law, to-wit, within the time limited by section .... of the Statutes of Wisconsin for the year 1913 [*by Wis. Stats. 1913 sec. 2651, when this ground of demurrer is taken there must be a reference to the particular statute relied on*].

1830. Demurrer to defense in answer (Wis. Stats. 1913 sec. 2658).

[*Title.*]

The plaintiff herein demurs to the answer herein [*or*, to the first defense stated in the answer herein], on the ground that upon the face thereof the said answer [*or* defense] does not state facts sufficient to constitute a defense.

E.... F....,
Plaintiff's Attorney.

1831. Demurrer to counter-claim (Wis. Stats. 1913 sec. 2658).

[*Title.*]

The plaintiff herein demurs to the first counter-claim in the answer herein [*or when there are separate answers:* in the answer of the defendant C.... D.... herein], on the ground that upon the face thereof said counter-claim does not state facts sufficient to constitute a counter-claim [because the court has no jurisdiction thereof].

Or: because said defendant has not legal capacity to maintain the same.

Or: because there is another action pending between the same parties for the same cause.

Or: because there is a defect of parties, in this, to-wit, that [*here state what the defect is and whether in parties plaintiff or defendant, and what additional party, naming him, should be present*].

Or: because the said counter-claim does not state facts sufficient to constitute a cause of action.

Or: because the cause of action stated therein is not pleadable as a counter-claim to this action.

E.... F....,
Plaintiff's Attorney.

1832. Demurrer to reply (Wis. Stats. 1913 sec. 2663).

[*Title.*]

The defendant herein demurs to the reply of the plaintiff herein, on the ground that upon the face thereof said reply does not state facts sufficient to constitute a defense.

E.... F....,
Defendant's Attorney.

1833. Demurrer to complaint for insufficiency (Minn. Gen. Stats. 1913 sec. 7754).

The defendant demurs [*or*, the defendants C.... D.... and E.... F...., *naming the demurrants*, demur] to the complaint herein [*or*, to the first, *or* second cause of action stated in the complaint herein] on the ground that it does not state facts sufficient to constitute a cause of action.

G.... H....,
Defendant's Attorney.

1834. The same, another form.

[*Follow last preceding form to and including the word "ground" and continue as follows*] that it appears on the face thereof* that the facts stated to not constitute a cause of action.

G.... H....,
Defendant's Attorney.

1835. Other forms of demurrer (Minn. Gen. Stats. 1913 sec. 7754).[4]

[*Add to last preceding form or substitute at* *]:

That the court has not jurisdiction of the person of this defendant [*or* these defendants].

[4] More than one of the various statutory grounds of demurrer may be joined in the same demurrer, but they must be separately stated and should be numbered. The statute of Minnesota does not specifically provide for the raising of the objection by demurrer that the action is barred by the statute of limitations, but the Supreme Court of that state has held that this objection may be raised by the general demurrer. Trebby v. Simmons, 38 Minn. 509; 38 N. W. 693.

For the states in which the statute of limitations is ground for demurrer see note (1), this chapter.

In Minnesota excess of parties is not ground for demurrer as a defect of parties. Hoard v. Clum, 31 Minn. 186; 17 N. W. 275.

Or: that the court has not jurisdiction of the subject of the action.

Or: that the plaintiff has not legal capacity to sue.

Or: that there is another action pending between the same parties for the same cause.

Or: that there is a defect of parties plaintiff [*or* defendant] by reason of the omission of [*here give name of omitted party or describe him as described in the complaint, giving briefly the facts which make him a necessary party*].

Or: that several causes of action are improperly united, to-wit, an action on contract and an action in tort for trespass to real property [*or otherwise state the nature of the actions, according to the fact*].

1836. Demurrer to defense in answer (Minn. Gen. Stats. 1913 sec. 7760).

[*Title.*]

The plaintiff demurs to the answer [*or*, to the first defense set forth in the answer] herein on the ground that upon its face the said answer [*or* defense] does not state facts sufficient to constitute a defense.

E.... F....,
Plaintiff's Attorney.

1837. Demurrer to counter-claim (Minn. Gen. Stats. 1913 sec. 7760).

[*Title.*]

The plaintiff demurs to the [first] counter-claim set forth in the answer herein, on the ground that upon its face the same does not state facts sufficient to constitute a counter-claim.

E.... F....,
Plaintiff's Attorney.

1838. Demurrer to petition (Iowa Ann. Code 1897 sec. 3561).[5]

[*Title.*]

The defendant demurs [*or*, the defendants C.... D.... and E.... F...., *naming the demurrants*, demur] to the

[5] In Iowa, by statute, the various grounds of demurrer must be numbered, and it is not sufficient to state the objections in the terms of the statue, but the defect relied upon, whether resulting from facts

petition herein [*or*, to the first, *or* the second count of the petition herein] on the ground that it appears on the face of said petition [*or* count].*

I. That the court has no jurisdiction of the person of the defendant because said petition shows that [*here state particularly the fact appearing on the face of the petition which shows lack of jurisdiction*].

II. That the court has no jurisdiction of the subject of this action because said petition shows that [*state the facts showing lack of jurisdiction*].

III. That the plaintiff herein has not legal capacity to sue in this, that it appears from said petition that the plaintiff is under the age of majority and is suing in his own name and not by his guardian or next friend [*or state other facts appearing in the petition and showing incapacity to sue*].

IV. That there is another action pending between the same parties for the same cause, to-wit, the action pending in the ..... court [*here describe the other action fully as the same is set forth in the petition*].

V. That there is a defect of parties plaintiff [*or* defendant] because of the omission of [*here name party omitted or describe him as he is described or referred to in the petition, and briefly state the facts showing him to be a necessary party*].

VI. That the facts stated in the petition [*or* count] do not entitle the plaintiff to the relief demanded in this [*here set out particularly the defect in the petition which is relied on*].

VII. That said petition [*or* count] on the face thereof shows that the cause of action therein stated accrued more than .... years prior to the commencement of this action, and is therefore barred by the statute of limitations, to-wit, sec. .... [*name the section relied on*].

VIII. That said petition on the face thereof shows that the cause of action is founded upon an agreement not to be performed within one year from the making thereof [*or*

stated or omitted, must be specifically pointed out; except that a demurrer to an equitable petition on the ground that the facts stated do not entitle the plaintiff to the relief demanded may be stated in those general terms. Iowa Ann. Code 1897 sec. 3562.

In Iowa a misjoinder or excess of parties is not demurrable as a defect of parties. The defect of parties contemplated by the statute is a failure to join a necessary party. Turner v. First National Bank, 26 Iowa, 562.

For the states in which mere misjoinder is a ground of demurrer, see note (1), this chapter.

state the nature of the agreement, showing it to be one of the agreements required to be in writing under sec. 4625 Iowa Code], and fails to show said agreement to be in writing as required by law.

IX. That said petition shows on the face thereof that the cause of action is founded on an account [*or other writing, describing it*] as evidence of an indebtedness, and that neither such writing [*or* account] nor any copy thereof is incorporated or attached to said petition, nor any sufficient reason stated for not doing so.

G.... H....,
Attorney for Defendant.

1839. General demurrer to petition in equity (Iowa Ann. Code 1897 sec. 3562).

[*Title.*]

[*Proceed as in last preceding form to the * and then substitute as follows*]:

That the facts stated in said petition do not entitle the plaintiff to the relief demanded.

[*See note to preceding form.*]

1840. Demurrer to defense in answer (Iowa Ann. Code 1897 sec. 3575).

[*Title.*]

The plaintiff demurs to the answer herein [*or* to the first count of the answer herein] on the ground that it appears on the face of said answer [*or* count]:

I. That the facts stated therein are not sufficient to constitute a defense in this [*here state specifically the defects claimed*].

E.... F....,
Plaintiff's Attorney.

1841. Demurrer to counter-claim (Iowa Ann. Code 1897 sec. 3575).

[*Title.*]

The plaintiff demurs to the first counter-claim set forth in the answer herein on the ground that it appears on the face of said counter-claim:

I. [*Here set forth the causes of demurrer, as in case of a demurrer to a petition. See Form 1838. A demurrer to a counter-claim lies for the same causes as a demurrer to a petition, except that it will not lie for lack of jurisdiction of the person of defendant, and the statute of limitations will not be ground for demurrer if the counter-claim shows that it was defendant's property when it became barred and was barred at the time the plaintiff's claim originated. Iowa Ann. Code 1897 sec. 3457.*]

E.... F....,
Attorney for Plaintiff.

1842. Demurrer to reply (Iowa Ann. Code 1897 sec. 3579).

[*Title.*]

The defendant demurs to the reply herein on the ground that the facts stated in said reply do not amount to a sufficient defense, in this [*here state specifically the defects claimed*].

E.... F....,
Defendant's Attorney.

1843. Demurrer to complaint (N. Dak. Rev. Codes 1905 secs. 6854–6855; S. Dak. C. C. P. 1908 secs. 121–122).

[*The statutes of North Dakota and South Dakota specifying the grounds upon which demurrers to complaints may be based are identical in terms, and are also identical with the Wisconsin statutes (Wis. Stats. 1913 sec. 2649) except that there is no provision for a demurrer on the ground of the operation of the statute of limitations. The forms heretofore given in this chapter for demurrers in Wisconsin may therefore doubtless be used with safety in these states, with the exception of the form relating to the statute of limitations. In South Dakota it has been held that a demurrer in the language of the statute is sufficient, except that if based upon lack of jurisdiction it must specify whether the lack be of person or subject-matter, and if based on defect of parties it must specify whether it be of parties plaintiff or defendant. Hudson v. Archer, 4 S. Dak. 128; 55 N. W. 1099. I have found no direct adjudication on the subject in North Dakota, but in Van Dyke v. Doherty, 6 N. Dak. 263; 69 N. W. 200, it seems to be intimated that a specific statement*

of the facts constituting the defect may be advisable if not necessary in that state, at least in all cases where the demurrer is not a general demurrer.]

1844. Demurrer to answer (N. Dak. Rev. Codes 1905 sec. 6863; S. Dak. C. C. P. 1908 sec. 130).

[*For this demurrer the forms heretofore given in this chapter for use in Minnesota, viz.: Forms 1836 and 1837 may be used.*]

1845. Demurrer to petition (Neb. R. S. 1913 secs. 7666, 7667).[6]

[*Title.*]

The defendant demurs [*or* the defendants C.... D.... and E.... F...., *naming the demurrants*, demur] to the petition herein [*or* to the first, *or* second cause of action stated in the petition herein] on the ground that it appears upon the face of said petition:

First. That the court has no jurisdiction of the person of the defendant.

Second. That the court has no jurisdiction of the subject of the action.

Third. That the plaintiff has not legal capacity to sue.

Fourth. That there is another action pending between the same parties for the same cause.

Fifth. That there is a defect of parties plaintiff.

Sixth. That there is a defect of parties defendant.

Seventh. That several causes of action are improperly joined.

Eighth. That the petition does not state facts sufficient to constitute a cause of action.

G.... H....,
Attorney for Defendant.

[6] In Nebraska the objection that the cause of action is barred by the statute of limitations may be taken advantage of under the general demurrer for insufficiency of facts to constitute a cause of action. Peters v. Dunnells, 5 Nebr. 460; Hurley v. Cox, 9 Nebr. 230; 2 N. W. 705. A demurrer for defect of parties lies only where necessary parties have been omitted. Hardy v. Miller, 11 Nebr. 395; 9 N. W. 475; Baldt v. Budwig, 19 Nebr. 739; 28 N. W 280.

1846. Demurrer to defense in answer (Neb. R. S. 1913 sec 7680).

[*Title.*]

The plaintiff demurs to the answer herein [*or* to the first count of the answer herein] on the ground that it appears upon the face thereof that said answer [*or* count] does not state facts sufficient to constitute a defense to this action.

E.... F....,
Plaintiff's Attorney.

1847. Demurrer to counter-claim or set-off (Neb. R. S. 1913 sec. 7680).

[*Title.*]

The plaintiff demurs to the counter-claim [*or* set-off] set forth in the answer [*or* the first count of the answer] herein on the ground that it appears on the face thereof:

I. That the court has no jurisdiction of the subject-matter of said counter-claim [*or* set-off].

II. [*State other grounds, as in case of demurrer to a petition. See Form 1845.*]

E.... F....,
Plaintiff's Attorney.

CHAPTER LXXXIV.

ANSWERS, FORMAL PARTS AND DENIALS.

1848. Formal parts of answer, general form.
1849. The same, where there are several defenses and a counterclaim.
1850. Commencement of answer by defendant appearing in person.
1851. The same, by defendant sued by wrong name.
1852. The same, by infant.
1853. The same, by lunatic.
1854. The same, by husband and wife answering jointly.
1855. Answer alleging partial defense.
1856. Answer upon information and belief.
1857. General denial.
1858. General denial of one of several causes of action.
1859. Denial of allegations not otherwise answered.
1860. Denial on information and belief.
1861. General denial of knowledge or information sufficient to form a belief.
1862. General denial as to a part of the pleading.
1863. General denial of knowledge or information, by several defendants answering together.
1864. Specific denial avoiding negative pregnant.
1865. General denial with exceptions.
1866. Specific denial.

The purpose of an answer is either to deny material allegations of the complaint, to state additional facts to avoid the effect of the facts set forth in the complaint, or to set up a counter-claim.

Defects appearing on the face of the complaint which are ground for demurrer cannot be taken advantage of by answer: they are waived by failing to demur. This, however, is a general rule subject to exceptions. Thus, in Wisconsin the objection of the operation of the statute of limitations may be taken advantage of by answer in all cases. Wis. Stats. 1913 sec. 2653. In all the states covered by this work except Iowa and Texas, it is provided by statute that any of the various grounds of demurrer which are not taken advantage of by demurrer or answer shall be deemed waived, except the objection to the jurisdiction of the court and the general objection that the complaint does not state suffi-

cient facts to constitute a cause of action.[1] In Iowa it is held generally that where demurrable defects appear on the face of the pleading they must be taken advantage of by demurrer, or they are deemed waived. Linden v. Green, 81 Iowa 365; 46 N. W. 1108; Daugherty v. C., M. & St. P. Co., 87 Iowa 276; 54 N. W. 219. By statute, however (Iowa Ann. Code 1897 sec. 3563), the objection that the facts stated in the petition do not entitle the party to any relief may be taken advantage of by motion in arrest of judgment. There cannot be a demurrer and an answer to the same cause of action, but if there be several causes of action in one complaint one may be demurred to and the other answered. The codes generally, if not universally, provide that the defendant may set forth in his answer as many defenses or counter-claims as he may have, whether they be of a legal or equitable nature, but they must be pleaded separately. Defenses which are inconsistent because their allegations of fact are repugnant, so that if one be true the other must be false, cannot be pleaded together, but if both may be true and they are only inconsistent because based on inconsistent legal theories they may be pleaded together. S. M. B. & Co. v. Harte, 95 Wis. 592; 70 N. W. 821; Maxwell, Code Pleading, 396, 397; Pomeroy's Code Remedies sec. 722; Steenerson v. Waterbury, 52 Minn. 211; 53 N. W. 1146; Stebbins v. Lardner, 2 S. Dak. 127; 48 N. W. 847. In Iowa, by express statute, inconsistent defenses may be pleaded in the same answer or reply. Iowa Ann. Code 1897 sec. 3620. Each defense or counter-claim pleaded must be complete in itself, but this does not necessarily require repetition at length of facts common to both defenses. If once stated, such facts may be incorporated in another separate defense or counter-claim by reference thereto and appropriate words by which they are adopted. Hypothetical defenses should be avoided if possible, but may be allowable where

[1] Wis. Stats. 1913 sec. 2654; Ariz. R. S. 1913 sec. 469; Ark. Dig. of Stats. 1904 sec. 6096; Cal. C. C. P. 1906 sec. 434; Colo. Code Ann. 1911 sec. 61; Idaho Rev. Codes 1908 sec. 4178; Kans. Gen. Stats. 1909 sec. 5688; Mont. Rev. Codes 1907 sec. 6539; Minn. Gen. Stats. 1913 sec. 7755; Mo. R. S. 1909 sec. 1804; Neb. R. S. 1913 sec. 7668; N. Dak. Rev. Codes 1905 sec. 6858; S. Dak. C. C. P. 1908 sec. 125; Okla. Comp. Laws 1909 sec. 5631; Oregon Laws 1910 sec. 72; Utah Comp. Laws 1907 sec. 2967; Wash. Rem. and Bal. Code 1910 sec. 263; Wyo. Comp. Stats. 1910 sec. 4383.

addressed to a matter not presumptively within defendant's knowledge and coupled with a denial of information and belief as to the truth of such matter.

Denials under the code must be general or specific, the general denial being properly addressed to the whole complaint, and the specific denial to a single allegation. Under denials in either form the defendant cannot prove any affirmative defense, but can only contradict or disprove some part of the plaintiff's proof. The denial should meet only material facts, and if the specific allegation to be denied is in the conjunctive the denial should be in the disjunctive, otherwise the denial will become a negative pregnant and may be held to raise no issue. Grimm v. Washburn, 100 Wis. 229; 75 N. W. 984; Bliss, Code Pl. sec. 332.

1848. Formal parts of answers, general form.

[*Name of court.*]

A.... B.... and C.... D....
Plaintiffs,
vs.
E.... F.... [*answering defendants, and where there are others who do not answer add:* impleaded with G.... H.... and others],
Defendant
[*or* Defendants].

The defendant E.... F...., answering the complaint herein, denies [*or, if the defense is new matter,* alleges, *or if the new matter be available as a counter-claim,* alleges for a counter-claim thereto]:

I. That, etc.

[*If there be no counter-claim, a prayer for a judgment of dismissal is probably unnecessary, but it is usual to add it, as follows*]*:*

WHEREFORE, the said defendant demands judgment dismissing said complaint with costs.

[*If there be a counter-claim, there should be a prayer for judgment of dismissal of the complaint, and for affirmative relief upon the counter-claim, as though it were a complaint.*]

J.... K....,
Attorney for Defendant E.... F....

[*Add verification if complaint be verified. See Chapter XVIII, supra.*]

1849. The same, where there are several defenses and a counter-claim.

[*Title.*]

The defendant E.... F...., answering the complaint herein:

First. For a first defense to the first alleged cause of action, denies [*etc., generally or specifically*].

Second. For a further defense to said first cause of action, said defendant alleges [*here set forth the facts constituting the defense*].

Third. For a further defense to said first cause of action, said defendant alleges [*here set forth the facts constituting it, except that if any of them have been alleged above, an express reference to and adoption of those allegations will suffice instead of a repetition of them*].

Fourth. For a counter-claim to the second alleged cause of action, said defendant alleges, etc.

WHEREFORE, said defendant demands, etc.

1850. Commencement of answer by defendant appearing in person.

The defendant Y.... Z...., in person, answering the plaintiff's complaint herein, alleges [*or*, denies]:

1851. The same, by defendant sued by wrong name.

This defendant, E.... F...., in the summons and complaint in this action called G.... E...., answering the plaintiff's complaint herein, alleges [*or* denies]:

1852. The same, by infant.

This defendant, an infant under the age of twenty-one years, by C.... D...., his guardian, answering the plaintiff's complaint herein, alleges [*or* denies]:

1853. The same, by lunatic.

The defendant E.... F...., a lunatic [*or*, a person of unsound mind, *or* an idiot, *or* an habitual drunkard], by M.... N...., his committee and guardian [*or* by O.... P...., his duly appointed guardian ad litem], answering the plaintiff's complaint herein, alleges [*or* denies]:

1854. The same, by husband and wife answering jointly.

E.... F...., one of the above-named defendants, and G.... F...., his wife, answering the plaintiff's complaint in this action, jointly allege [*or* deny]:

1855. Answer alleging partial defense.

The defendant, for a partial defense to the alleged cause of action set forth in the complaint, alleges [*or* denies]:

1856. Answer upon information and belief.

The defendant, answering the complaint of the plaintiff herein, upon information and belief, denies [*or* alleges]:

1857. General denial.

The defendant E.... F...., answering the complaint herein, denies each and every allegation thereof.

1858. General denial of one of several causes of action.

The defendant, answering the first alleged cause of action contained in the complaint herein, denies each and every allegation in the said alleged first cause of action contained.

1859. Denial of allegations not otherwise answered.[2]

The defendant, answering the complaint herein, denies each and every allegation in said complaint contained not hereinbefore [*or* hereinafter] specifically admitted [*or* specifically controverted].

[2] This form of denial is quite frequently used and is generally held sufficient; but it must be said that it can hardly be called either a general or specific denial and its use is not to be recommended. Althouse v. Jamestown, 91 Wis. 46; 64 N. W. 423. In Minnesota it is said to be sufficient if there is no ambiguity as to the matters which are specifically answered. Jellison v. Halloran, 40 Minn. 485; 42 N. W. 392.

1860. Denial on information and belief.

Upon information and belief the defendant denies [*state hat allegations of complaint are denied.*]

1861. General denial of knowledge or information sufficient to form a belief.

Says that he has no knowledge or information sufficient to form a belief as to the truth of any of the allegations of the complaint.

1862. General denial as to a part of the pleading.[3]

Denies each and every allegation contained in paragraphs numbered .... and .... of said complaint.

1863. General denial of knowledge or information, by several defendants answering together.

Severally say, each for himself that he has no knowledge, or information sufficient to form a belief as to the truth of any of the allegations of the said complaint.

1864. Specific denial avoiding negative pregnant.

Denies that at [*name place stated in complaint*] or at any other place, and in the [*name day charged in complaint*] or at any other time the defendant assaulted or struck plaintiff [*or otherwise negative the specific allegations of the complaint.*]

1865. General denial with exceptions.

Denies each and every allegation in said complaint contained except:

1. The allegation that [*state specifically the allegation not denied*].

2. The allegation that, etc.

1866. Specific denial.

The defendant, answering the complaint herein, denies that he ever indorsed the said note.

[3] In Collins v. Singer Mfg. Co., 53 Wis. 305; 10 N. W. 477, a denial of everything between certain words and folios of the complaint was held insufficient.

CHAPTER LXXXV.

DEFENSES IN ABATEMENT.

1867. No jurisdiction of the subject or person.
1868. The same, by foreign consul.
1869. That a court of the United States possesses exclusive jurisdiction.
1870. Alien enemy.
1871. Defendant an Indian.
1872. Another action pending.
1873. Another form, in the case of a counterclaim.
1874. Pendency of partnership cause, in answer to partition suit.
1875. Misnomer.
1876. Non-joinder of one who was a party to the contract.
1877. The same, in case of indorsement, etc.
1878. Non-joinder of other owners in actions relative to land.
1879. Non-joinder of a co-administrator.
1880. Non-joinder of a co-executor.
1881. Non-joinder of tenant in common, as to part of the goods.
1882. Joint interest in plaintiff and a third person.
1883. Non-joinder of necessity defendant.
1884. Partnership of defendants with a third person.
1885. Assignment of cause of action, by plaintiff, to third person.
1886. That plaintiff has been adjudged a bankrupt.
1887. That plaintiff has an adequate remedy at law.
1888. Action premature, credit unexpired.
1889. Extension of time of payment.

The codes generally do not retain the name "plea" or "answer in abatement," but the inherent nature of such defenses is not changed. They are such defenses as go to the maintenance of the present action alone, as distinguished from defenses which go to the cause of action itself. They are to be pleaded as separate defenses, but are to be pleaded in the same answer with defenses in bar, and not alone and before pleading the defenses in bar, as was the rule at common law.

1867. No jurisdiction of the subject or person.

The defendant, further answering, alleges that this court has no jurisdiction of said supposed cause of action set forth in the complaint [*or*, of the person of this defendant], for the

reason that* [*here state the facts showing lack of jurisdiction of subject-matter or person, fully and exactly*].

1868. The same, by foreign consul.

[*As in last preceding form to *, and then continue*]: this defendant was at the commencement of this action, and is now, consul of the King of Italy for the city of ..... duly accredited to the President of the United States, and by him received and acknowledged as such.

1869. That a court of the United States possesses exclusive jurisdiction (sustained in U. S. v. Lathrop, 17 Johns. 4).

I. That said county is within the .... district, in which there is and was a circuit court of the United States, called a district court, holden for said ..... district.

II. That all suits or penalties and forfeitures incurred under the laws of the United States, to which the United States are parties, arising within said district, ought to be brought in said court, and not elsewhere.

III. That said A.... B...., at the commencement of this suit, was and still is resident within said district, and at .....

1870. Alien enemy (sustained in Bell v. Chapman, 10 Johnson 183).

I. That the plaintiff was not at the commencement of this action, and is not now, a citizen of the United States, by naturalization or otherwise; but was and is an alien, born in ..... out of the allegiance of the United States, and within the allegiance of the kingdom of .....

II. That at the commencement of this action the government of said ..... were and still are at war with, and enemies of the United States.

III. That the plaintiff then was, and still is, an alien enemy abiding without the United States, and at ....., within said ....., and adhering to the said enemies of the United States.

1871. Defendant an Indian.

That the defendant, at the time of making the said writing obligatory, was, ever since has been, and still is, an Indian, residing on lands reserved to the ..... Indians, within the purview of the act entitled [*title*] passed [*date of enactment*].

1872. Another action pending.

That at the commencement of this action there was, and now is, another action pending in the ..... court, in and for the county of ..... in this state, between the same parties as this action*, and for the same cause as that set forth in the complaint herein.

1873. Another form, in the case of a counter-claim.

[*As in preceding form to the* *, *continuing*]: in which the plaintiff in this action, being the defendant, has set up the same cause of action, alleged in the complaint as a counter-claim, against this defendant, who is the plaintiff in the said action.

1874. Pendency of partnership cause, in answer to partition suit (sustained by Danvers v. Dorrity, 14 Abb. Pr. 206).

I. That the premises of which the plaintiff seeks partition belong to the parties to the action as tenants in common.

II. That the parties were partners in trade, and carried on business on said premises, and that the said premises were owned by them as such copartners.

III. That in the month of ....., 19.., the partnership was dissolved by the retirement of one of the defendants therefrom; and in ....., 19.., and before this action the, defendant D..... commenced an action in the ..... court of ..... against the plaintiff in this action and the defendant R....., demanding judgment that the defendants therein be decreed to render an account of the stock, fixtures, machinery, and effects, and that the plaintiff's interest be adjusted and stated, and that he have judgment for the amount of his interest therein, or that a receiver be appointed to take and sell the property, and distribute it among the partners according to their respective interests; which action is still pending and undetermined.

1875. Misnomer.

That the true name of the plaintiff [*or* this defendant] is, and always has been, E.... F.... and not A.... B...., in which name he sues [*or* is sued].

1876. Non-joinder of one who was a party to the contract.

I. That the supposed contract [*or other cause of action*] mentioned in the complaint, if any such was made, was made with said Y.... Z.... by the plaintiff [*or* by the defendant] and * one M.... N.... jointly [*and if as partners, add:* as partners, under the firm-name of Y.... Z.... & Co.]

II. That the said M.... N.... is still living, at .....

1877. The same, in case of indorsement, etc.

I. That the supposed note in the complaint alleged to have been indorsed [*or* transferred] to the plaintiff, was not indorsed [*or* transferred] to him individually, but to the plaintiff and one [*continue as in Form 1876 from the* *].

1878. Non-joinder of other owners in actions relative to land.

That M.... N.... and O.... P...., residing at ..... are tenants in common with the plaintiff in said lands, and necessary parties to this action.

1879. Non-joinder of a co-administrator.

That after the death of said M.... N.... and on or about the .... day of ....., 19.., letters of administration were duly issued to one Q.... P.... together with the plaintiff, by the ..... court of the county of .....; and said O.... P.... thereupon duly qualified as administrator, and still is such, and living at .....

1880. Non-joinder of a co-executor.

I. That the said M.... N.... the testator mentioned in the complaint, by his will duly appointed the plaintiff and one O.... P...., jointly, executors of his said will.

II. That on or about the .... day of ....., 19.., letters testamentary thereupon were duly issued to said

O.... P.... [together with the plaintiff] by the ..... court of the county of .....; and he thereupon duly qualified as executor, and still is such, and living at .....

1881. Non-joinder of tenant in common, as to part of the goods.

That as to the taking [*or* converting] of said [*here mention the part as designated in the complaint; or, if not there designated, say:* a part of the goods mentioned in the complaint to-wit, a wagon and harness], the same were at the time of said supposed trespass the property of the plaintiff and one M.... N...., as tenants in common, and not of the plaintiff alone.

II. That the said M.... N.... is still living at .....

1882. Joint interest in plaintiff and a third person.

I. That the plaintiff had not, at the time of the alleged grievances in the complaint mentioned [nor at any time since] any title to or interest in the [*property, the subject of the action*] therein mentioned, except jointly and undividedly with M.... N.... and O.... P....

II. That said M.... N... and O.... P.... are still living at .....

1883. Non-joinder of necessary defendant.

That the said work and labor were done, and money was paid by the plaintiff, at the request of the defendant, jointly with one M.... N...., who is still living at .....

1884. Partnership of defendants with a third person.

I. That at the time of the making of the contract mentioned in the complaint, these defendants were in partnership with one M.... N...., under the firm name of Z.... N.... & Co.

II. That said note was made by these defendants jointly with said M.... N...., and not otherwise [which the plaintiffs then well knew].

III. That said M.... N.... is still living at .....

1885. Assignment of cause of action, by plaintiff, to third person.

That after the sale and delivery [*or accruing of other cause of action*] in the complaint alleged, and before this action, the plaintiff duly assigned his cause of action against this defendant arising therefrom [*or*, said judgment, *etc., or other thing in action*] to one M.... N.... who then became, and still is, the lawful owner and holder thereof.

1886. That plaintiff has been adjudged a bankrupt.

That after the claim as set forth in the complaint had accrued, and before the commencement of this action, the plaintiff was duly adjudged a bankrupt in the [*name the court*] and one E.... F.... was by said court duly appointed a trustee in bankruptcy of the plaintiff, and plaintiff thereupon and pursuant to the direction of the said court assigned all his property, including the claim alleged in the complaint, to said E.... F.... as such trustee.

1887. That plaintiff has an adequate remedy at law.

That the plaintiff herein has an adequate remedy at law for damages against this defendant, who is financially solvent and able to respond in damages for the breach of any contract to which he is a party, and that said plaintiff cannot maintain this action in equity by reason of such facts.

1888. Action premature, credit unexpired.

That the goods described in the complaint were sold on a credit of .... months from ....., 19.., which time had not expired when this action was commenced.

1889. Extension of time of payment.

That prior to the commencement of this action the plaintiff agreed with the defendant in consideration of the sum of ..... dollars then paid [*or* in consideration of the transfer by defendant to plaintiff of [*describe collateral*] to extend the time of payment of said debt until ....., 19.., which period has not yet expired.

CHAPTER LXXXVI.

GENERAL DEFENSES ON THE MERITS.

1890. Accord and satisfaction.
1891. The same, acceptance of note.
1892. Arbitration and award.
1893. Estoppel.
1894. Estoppel by former judgment.
1895. The same, pleading foreign judgment in detail.
1896. Statute of limitations, ordinary form.
1897. Statute of limitations in tort action.
1898. Foreign statute of limitations in tort action.
1899. Release.
1900. Specific denial of demand.
1901. Statute of limitations in action where statute does not run until plaintiff's discovery of the facts.
1902. Estoppel of owner of real estate.

1890. Accord and satisfaction.

That after making the contract [*or other instrument*] and the alleged breach thereof [*or*, after committing the said supposed grievances] in the complaint mentioned [*or* in the .... cause of action in the complaint mentioned] and before this action, to-wit, on the .... day of ....., 19.., * this defendant delivered to the plaintiff [*or*, to A.... B.... one of the plaintiffs, and said A.... B....] accepted and received from the defendant ..... dollars [*or, briefly describing the thing delivered, if not money*] in full satisfaction and discharge of the damages [*or* moneys, *or* liability, *or* debt, *as may be appropriate*] in the complaint mentioned, and of all the damages by the plaintiff sustained by reason of the non-performance [*or* non-payment, *or* neglect, *or* acts] therein alleged.

1891. The same, acceptance of note.

That on ....., 19.., plaintiff agreed with defendant to accept in full satisfaction of the claim set forth in the complaint the promissory note of defendant for ..... dollars, payable on or before ....., 19.., and thereupon defendant made and delivered such a note to plaintiff and plaintiff accepted and received the same in full satisfaction of said claim.

1892. Arbitration and award.

I. That after the maturity of the note [*or after the accruing of other cause of action*] mentioned in the complaint, to-wit, on the .... day of ....., 19.., the plaintiff and this defendant executed a written agreement, whereby they mutually submitted the demand alleged in the complaint [among other controversies] to the arbitration of one M.... N.... who, thereafter and before the commencement of this action, to-wit, on the .... day of ....., 19.., by his award then duly made and published, awarded that [*stating the substance of the award*].

II. That the defendant, on the .... day of ....., 19.., and before this action, duly performed said award on his part by [*here state payment or tender*].[1]

1893. Estoppel.[2]

For a further and separate defense the defendant alleges that the plaintiff ought not to be admitted to say [*here state the matter to which the estoppel is interposed, e. g.*, that said premises belonged to M.... N....] for the reason that [*here state the facts showing the estoppel, e. g.*, that the plaintiff, on or about the .... day of ....., 19.., conveyed said premises to the defendant by deed, containing a full covenant of warranty.

1894. Estoppel by former judgment.

That on the .... day of ....., 19.., at ..... in an action brought in the ..... court [*or* before M.... N...., a justice of the peace in and for .....] by A.... B.... against C.... D...., for the same cause of action as that set forth in the complaint herein, said A.... B.... recovered judgment duly given, upon the merits thereof, against said C.... D.... for ..... dollars [*or state other relief adjudged*] which judgment still remains in full force and unreversed.

[1] It is unnecessary to allege performance if the award directed payment of the amount found due, for then it is the equivalent of a judgment, but if the award is simply in pursuance of a submission to state an account or fix a sum, and does not purport to direct satisfaction or payment, performance must be alleged. Armstrong v. Masten, 11 Johnson, 189; Brazill v. Isham, 12 N. Y. 9.

[2] Estoppel is an affirmative defense, and to be available the facts must be pleaded as new matter, unless they appear on the face of the complaint.

1895. The same, pleading foreign judgment in detail (from N. Y., etc., Co. v. Robinson, 25 Abbott's N. C. 116).

I. That an equity suit was heretofore brought by H.... J.... [the person mentioned in the complaint herein as receiver of the Erie Railway company] as such receiver, against this defendant, in the ..... county circuit court, in the state of ....., the bill of complaint wherein prayed for a decree by which it might be adjudged and decreed, among other things, that this defendant gave no consideration for the .... shares of stock mentioned in the contract, "Exhibit A" annexed to the complaint herein, and had no legal or equitable right or title in or to the same; that the actual title to the .... shares of stock of M.... N.... [mentioned in the complaint herein] in the ..... company, remained in said Erie Railway company: that this defendant acquired no title to the .... shares of stock allotted to him [mentioned in the complaint herein] and that the actual title remained in the Erie Railway company]; that the agreement, a copy whereof is annexed to the complaint herein, was induced by false and fraudulent representations of said defendant, and that the same should be canceled and annulled; that defendant should be required to pay to said H.... J...., as such receiver, the sum of ..... dollars, with the interest thereon, and for such further and other order or relief as the nature of the case might require, and as might be agreeable to equity and good conscience.

II. That the said bill of complaint was personally subscribed by said H... J... and verified by him upon oath on ....., 19.., and contains all the allegations material to the present action which are contained in the amended complaint herein, except that [if it be a material allegation] said receiver and said Erie Railway company were induced to make said contract ["Exhibit A" annexed to the complaint herein] by reason of the statements of this defendant that his title to said stock was a good and clear title, and that no other person had a lawful claim thereto; but that this matter might have been also litigated in the aforesaid suit. The paper hereto annexed as a part hereof and marked "Exhibit A," is a true copy of the bill of complaint in said suit.

III. That the plaintiff herein, on or about ....., 19.., became a party to the suit mentioned in the preceding paragraphs, and filed a supplemental bill of complaint therein by leave of the said court; that answers were duly filed to the said bill and supplemental bill therein by this defendant, denying the equities set up in said bills; that a replication was duly filed by the complainant, and said suit duly came on to be heard by said court in chancery, and each party introduced evidence upon said hearing, and the taking of evidence therein was closed, and thereafter, and on or about the .... day of ....., 19.., the said bill and supplemental bill in said suit were dismissed by order of the said court, a copy of which order is hereto annexed as a part hereof and marked "Exhibit B," and that the recitals in said order were and are true.

IV. That by said order the matters in this action were finally adjudicated and settled, and that the plaintiff is thereby barred from prosecuting or maintaining this action.

1896. Statute of limitations, ordinary form.[3]

That the cause of action stated in the complaint [*or*, that as to ..... dollars, part of the cause of action stated in the complaint, the same] did not accrue within .... years before the commencement of this action.

1897. Statute of limitations in tort action.

That the defendant was not guilty of the grievances alleged in the complaint [*or*, in the first cause of action in the complaint] at any time within .... years before the commencement of this action.

1898. Foreign statute of limitations in tort action (adapted from Eingartner v. Steel Co., 103 Wis. 373; 79 N. W. 433).

For a further and separate defense, the defendant alleges that the said personal injury described in the complaint occurred in the state of ..... and that at the time of the occurrence thereof, to-wit, the .... day of ....., 19..,

[3] As to when the statute of limitations may be taken advantage of by demurrer, see Chapter LXXXIII, *supra*, and notes.

and at all times thereafter to the present time both the plaintiff and this defendant were and still are citizens and residents of the state of ....., and that at the time of said injury there was, ever since has been, and still is a statute of the state of ..... known as section .... of chapter .... of the Revised Statutes of said state which provides as follows [*give copy of section, or state its substance*]. That no action was begun by the plaintiff to recover on account of said alleged injury in the said state of ..... within .... years next after the cause of action alleged in said complaint accrued, nor was this action commenced within said period of two years. Wherefore this defendant alleges that the said cause of action has become and is by virtue of the operation of said statute completely barred.

1899. Release.

[*As in first form in this chapter to the *, then continuing*]: the plaintiff [*or*, the plaintiffs, jointly, *or*, A.... B...., one of the plaintiffs], in consideration of ....., by deed, released this defendant from the claim set up in the complaint [*or*, executed to this defendant a release, of which the following is a copy: [*giving copy*].

1900. Specific denial of demand.

The defendant denies that the plaintiff at any time demanded the [proceeds of the goods] in said complaint mentioned at any time prior to the commencement of this action.

1901. Statute of limitations in action where statute does not run until plaintiff's discovery of the facts.

That each and every fact alleged in the complaint exclusive of paragraphs [*specifying them*] thereof was discovered and actually known by plaintiff on or before the .... day of ....., 19..; that this action was commenced on or about the .... day of ....., 19.., and not within .... years from the time when plaintiff had actual knowledge of the facts upon which his alleged cause of action depends.

1902. Estoppel of owner of real estate.

II. The defendant for a second and further defense herein alleges that the plaintiff is estopped from claiming that he is

the owner of the premises described in the complaint [*or* that he has a mortgage on the premises] for the reason that at the time this defendant was negotiating for the purchase of the said premises from one M.... N...., the plaintiff, with knowledge that such negotiation was in progress, and in order to induce the plaintiff to purchase the same, stated to the defendant that the said M.... N.... owned said premises free of incumbrance, [*or* that said mortgage had been paid, *or otherwise according to fact*] that the defendant believed said statement and fully relied thereon and therefor purchased said premises of the said M.... N.... and paid the sum of ..... dollars therefor.

CHAPTER LXXXVII.

VARIOUS ALLEGATIONS AND DENIALS RELATING TO CAPACITY TO SUE OR BE SUED.

1903. Denial of assignment.
1904. Allegation of payment to assignor without notice.
1905. Denial of incorporation of plaintiff.
1906. Denial of partnership. (Wisconsin, Minnesota and Iowa.)
1907. Denial of representative character. (Wisconsin and Iowa.)
1908. Allegation that executor renounced.
1909. Allegation that defendant was a special partner.
1910. Allegation of maintenance.
1911. Allegation of colorable assignment made only to give jurisdiction.

1903. Denial of assignment.

The defendant [upon information and belief] denies that the said [*alleged assignor*] on the .... day of ....., 19.., or at any other time, assigned or transferred to the plaintiff the said note and mortgage [*or in case of a mere claim or cause of action*, the said claim or cause of action] described in the complaint, and denies that the plaintiff was or is the holder or owner thereof. [*If the execution of a formal instrument of assignment is alleged in the complaint, the above form should be varied so as to deny that the alleged assignor* on the .... day of ....., 19.., or at any other time executed or delivered to the plaintiff the alleged assignment of the said note and mortgage, *or* claim as in said complaint alleged, etc.]

1904. Allegation of payment of assignor without notice.

That on or about the .... day of ....., 19.., and prior to the commencement of this action the defendant, without knowledge or notice of the alleged assignment of the said note [*or* claim] described in the complaint, paid to the said assignor the full amount due thereon [*or* the sum of ..... dollars] which was accepted and received by the said [*assignor*] in full payment and discharge of said note [*or* claim, *or* cause of action].

1905. Denial of incorporation of plaintiff.

The defendant, further answering the complaint herein, expressly denies * that the said plaintiff was at the time of the commencement of this action or now is a corporation as in said complaint alleged.

[*This is doubtless sufficient denial in Wisconsin (Wis. Stats. 1913 sec. 4199) and in Nebraska (Maxwell's Code Pleading, Form 511), but in Minnesota, Iowa, North Dakota and South Dakota there should be an affirmative allegation that the plaintiff is not a corporation (Minn. Gen. Stats. 1913 sec. 7774; N. Dak. Rev. Codes 1905 sec. 7362; S. Dak. C. C. 1908 sec. 414; Iowa Ann. Code 1897 secs. 3627, 3628), and in these last named states the answer should proceed as above to * and continue:* all allegations of said complaint relating to the alleged incorporation of the plaintiff, and alleges that the plaintiff was not at the time of the commencement of this action and is not now a corporation (*in Iowa add:*) and was never incorporated under the laws of this state or of any other state or government.]

[*Add verification.*]

1906. Denial of partnership (Wis. Stats. 1913 sec. 4197; Minn. Gen. Stats. 1913 sec. 7175; Iowa Ann. Code 1897, secs. 3627, 3628).

The defendant, further answering the complaint, expressly denies that the said A.... B.... and C.... D.... were or are partners, as alleged in said complaint, and on the contrary alleges that the said A.... B.... and C.... D.... were not at the time of the commencement of this action and are not now partners. [*Or,* that the said A.... B.... was not and is not a partner with the said, *naming the others.*]

[*Add verification.*]

1907. Denial of representative character (Wis. Stats. 1913 sec. 4200; Iowa Ann. Code 1905 secs. 3627, 3628).

The defendant, further answering the complaint, expressly denies that the plaintiff was on the .... day of ....., 19.., or at any time, appointed executor of the estate of E.... F.... deceased [*or administrator, or guardian, or trustee, as the case may be*], and denies that the said plaintiff was or is

now such executor [*or guardian, etc.*] [*In Iowa add:* and on the contrary alleges that the said plaintiff was never appointed such executor, *or guardian*, and is not now such executor, *or guardian*, etc.]

[*Add verification.*]

1908. Allegation that executor renounced.

I. That said executor, after the death of the testator, and on or about the .... day of ....., 19.., by writing signed by him, and attested by two witnesses, and proved to the satisfaction of the ..... court of the county of ....., before whom said will was proved, renounced said appointment as executor [leaving said co-executor, who is still living, sole executor of said will]; which renunciation was duly filed in the office of said ..... court.

[II. That said co-executor has duly qualified and taken upon himself the execution of said will, and is now such executor.]

[*Or:* II. That thereupon letters of administration with said will annexed were issued upon said M.... N....'s estate to one O.... P.... by the said ..... court, by an order duly made on the .... day of ....., 19..]

1909. Allegation that defendant was a special partner.

Defendant alleges that the firm of C.... D.... & Co. was at all times referred to in the complaint, and is, a limited co-partnership duly formed under the laws of the state of ..... wherein C.... D.... was and is the general partner, and this defendant E.... F.... was and is the special partner, and upon information and belief defendant alleges that if the note described in the complaint was ever made, the same was made by and was the act and obligation of said limited partnership.

1910. Allegation of maintenance.

I. That the plaintiff is, and at the time when he purchased the claims in controversy was, an attorney of the ..... court of this state, practicing as such at .....

II. That he purchased said [*describe the claims*] with full knowledge and notice that the same were contested and

would be litigated, and for the purpose of bringing action thereon.

1911. Allegation of colorable assignment made only to give jurisdiction.

I. That this action does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court.

II. That the assignment or transfer [*or*, conveyance] by E.... F.... to the plaintiff, alleged in the complaint, was not absolute, but the same was without consideration and for the sole purpose of creating a case cognizable in this court, and that the said E.... F.... remains the real owner of said alleged cause of action, and said plaintiff has no right or interest therein, but is prosecuting this action for the benefit of the said E.... F....

[*If diverse citizenship is falsely alleged by plaintiff, add denial, as thus:* That said E.... F.... was not, at the time of the commencement of this action, a citizen of the state of ....., but he was then a citizen of the state of .....]

CHAPTER LXXXVIII.

DENIALS OF THE CONTRACT SUED ON.

1912. Denial of the contract, general form.
1913. Denial of deed.
1914. Denial of conditional delivery.
1915. Allegation of delivery in escrow.
1916. Denial of indebtedness.
1917. The same, admitting part.

1912. Denial of the contract, general form.

The defendant denies that on the .... day of ....., 19.., or at any other time, he made or entered into the agreement mentioned and described in paragraph one, of the complaint herein.

1913. Denial of deed.

The defendant denies that on the .... day of ....., 19.., or at any other time, he executed or delivered to the plaintiff the deed mentioned and described in said complaint.

1914. Denial of conditional delivery.

The defendant denies the allegations of the complaint herein whereby it is alleged that the said note [*or* deed] described in said complaint was executed and delivered by the plaintiff upon the condition or understanding set forth in said complaint, and on the contrary thereof this defendant alleges that the said note [*or* deed] was executed and delivered by the said plaintiff absolutely and without condition.

1915. Allegation of delivery in escrow.

I. The defendant alleges that he gave said deed [*or other writing*] to secure the repayment of ..... dollars, then lent by the plaintiff to one M.... N...., and that he delivered said deed, not to the plaintiff or his agent, but to one O.... P.... as an escrow, to be kept by him upon condition that if the said M.... N.... should within .... months secure

the repayment of said sum of money to the plaintiff by a mortgage upon his freehold at .....; that then the said deed should be immediately discharged and annulled, and returned to the defendant, and that only in case of default of the said M.... N.... so securing the repayment of the said sum, should the said deed of the defendant stand in force.

II. That within the time agreed, and on the .... day of ....., 19.., said M.... N.... did secure the repayment of the said sum to the plaintiff by a mortgage upon said freehold, which the plaintiff then and there accepted as such security; whereby the deed of the defendant so delivered in escrow became void.

1916. Denial of indebtedness.[1]

The defendant denies that he is now or was at the time of the commencement of this action indebted to the plaintiff in the sum of ..... dollars or in any other sum.

1917. The same, admitting part.

The defendant admits that he is indebted to the plaintiff in the sum of ..... dollars, and consents that the plaintiff have judgment therefor, but as to the residue of the sum claimed by the plaintiff in his complaint, the defendant denies that he is now or was at the time of the commencement of this action so indebted.

[1] This and the following form are only proper to be used where the complaint contains simply a general allegation of indebtedness. If the facts showing the indebtedness are specifically pleaded in the complaint they must be either generally or specifically denied.

CHAPTER LXXXIX.

INVALIDITY OF THE CONTRACT SUED ON.

1918. Coverture of the defendant.
1919. That defendant was a married woman, and signed the note as surety only for her husband.
1920. Infancy of defendant.
1921. Insanity of defendant.
1922. Fraud in procuring contract.
1923. Duress by imprisonment.
1924. Duress by threats.
1925. Statute of frauds, as to leasing or sale of lands.
1926. The same, as to agreement not to be performed within a year.
1927. The same, as to special promise to answer for default, etc., of another.
1928. The same, as to agreement in consideration of marriage.
1929. The same, as to sale of personal property.
1930. Ultra vires of corporation.
1931. That the contract sued on is a foreign one, void by the law of the place.
1932. That the contract was a cover for a wager.
1933. That the debt was for money lost at play.
1934. That the contract was made to compound a felony.
1935. Note given for liquor sold without license.
1936. Usury by ante-dating security.
1937. That the contract was made on Sunday.
1938. Failure of consideration.

Unless the illegal character of the contract appears upon the face of the complaint the facts establishing its illegality must be distinctly set up in the answer in order to entitle the defendant to introduce proof thereof. Such proof will not be admitted under a mere denial of the contract.

1918. Coverture of the defendant.[1]

That at the time of the making of the supposed [*contract*] alleged in the complaint, this defendant was [and still is] the wife of one M.... N.... [and that she did not then have nor has she now any separate property or business of any nature, *or in case she has a separate estate or business,*

[1] The married women's acts in some tates doubtless eliminate this defense. No attempt is here made to determine to what extent this is true; the law of the particular state should be carefully studied. In Wisconsin the defense still seems available. Wis. Stats. 1913 sec. 2345.

and that the said supposed contract did not in any way concern the separate property or business of this defendant].

1919. That defendant was a married woman, and signed the note as surety only for her husband (adapted from Emerson Co. v. Knapp, 90 Wis. 34; 62 N. W. 945).

That at the time this defendant signed the said note described in the complaint she was and still is a married woman and the wife of C.... D.... and that the said C.... D.... executed said notes as principal maker in payment of a debt then owing by him individually to the plaintiff, and for no other consideration, and that this defendant thereupon signed said note at the request of and as surety for her said husband and not otherwise, and this defendant received no consideration for said note nor did the same in any way concern her separate property or business.

[*See note to the last preceding form.*]

1920. Infancy of defendant.

That at the time of making the supposed contract [and of the delivery of the goods, *or other consideration*] alleged, the defendant was under the age of twenty-one years; to-wit, ... years of age, and that the said supposed contract was not entered into for the purchase of necessaries for this defendant [*or* that the said goods so delivered were not necessaries].

1921. Insanity of defendant.

That at the time of the making of the alleged promise [*or* agreement, *or* of the executing of the alleged deed] the defendant was of unsound mind, and thereby incapable of making [*or* executing], and of understanding the same, as the plaintiff then well knew.

1922. Fraud in procuring contract.

I. That the instrument mentioned in the complaint was obtained from defendant by the plaintiff [and others in collusion with him] by fraud and misrepresentations, in this, that the said plaintiff [and one E.... F....] then and

there falsely and fraudulently represented to the defendant [*here set forth the alleged false representations as fully and specifically as in a complaint in an action founded upon fraud or deceit or an action brought for the cancellation of instruments on the ground of fraud, for which see previous chapters of this work on those subjects*].

II. That this defendant then and there relied upon the said false representations so made, and believed them to be true, and so relying and believing, was thereby induced to execute and deliver the said instrument, and not otherwise. [*If defendant has received any consideration, a return or offer to return the same should be alleged, and if affirmative relief be sought the defense should be pleaded as a counter-claim and judgment demanded, as for instance*]:

WHEREFORE the defendant demands judgment that the said instrument be adjudged void and be delivered up to be cancelled, and for such further relief as may be just and equitable, with costs.

1923. Duress by imprisonment.

That the defendant, at the time of the making of the said [contract] was imprisoned by the said plaintiff [and others in collusion with him] and then and there detained and forcibly deprived of his liberty until, solely by reason of the force and duress of such imprisonment and in order that he might be released therefrom, he executed and delivered the said [contract] to the plaintiff. [*If affirmative relief by way of cancellation of the instrument or otherwise is necessary, plead as a counter-claim, add allegations as to return or readiness to return consideration, and demand for judgment as in last preceding form.*]

1924. Duress by threats.

That the instrument in the complaint mentioned was obtained from the defendant by the plaintiff [and others in collusion with him] by duress of the defendant, in this, that the said defendant then and there threatened the defendant that [*here state specifically the threats used*], and that the defendant, solely in consequence of said threats and in the fear that the plaintiff would execute the same, made and delivered the said instrument and not otherwise. [*If neces-*

sary to plead as a counter-claim, add the necessary allegations and demand for judgment as indicated in two preceding forms.]

1925. Statute of frauds, as to leasing or sale of lands.[2]

That neither the said lease, though for a longer period than one year [*or*, said contract for the sale of said lands], nor any note or memorandum thereof expressing the consideration, was ever in writing and subscribed by the said C.... D.... by whom the lease [*or* sale] is alleged to have been made, or by any lawfully authorized agent of said C.... D.... [nor was the said agreement ever partly performed].

1926. The same, as to agreement not to be performed within a year.

That although the said agreement by its terms not to be performed within one year from the making thereof, neither said agreement nor any note or memorandum thereof [expressing the consideration] was ever in writing and subscribed by the said C.... D.... who is sought to be charged therewith [or by his authorized agent].

[*See note to preceding form.*]

1927. The same, as to special promise to answer for default, etc., of another.

I. That the supposed promise in the complaint alleged is a special promise to answer for the debt [*or* default, *or* mis-

[2] The statutes of frauds of the various states covered by this work, though substantially similar, differ in some particulars, and the statute of the particular state should be carefully examined before framing the pleading. This form and the following forms are believed to be adapted for use as given in the states of Wisconsin, Minnesota and Oregon. Wis. Stats, 1913 sec. 2304, 2307, 2308; Minn. Gen. Stats. 1913 sec. 6998, 6999, 7003; Oregon Laws 1910 sec. 804, 808. In Colorado contracts for leases for a longer period than one year, or for the sale of lands or any interest therein, are void unless the contract, note or memorandum, *expressing the consideration*, is in writing. Colo. Stats. Ann. 1911 sec. 2662. In the following states it is not required that the written memorandum should express the consideration: Arizona (R. S. 1913 sec. 3272); Arkansas (Dig. of Stats. 1904 sec. 3654, 3664); California (C. C. 1906 sec. 1624); Colorado (except as noted above, Stats. Ann. 1911, 2662, 2663, 2666); Idaho (Rev. Codes 1908 sec. 6009); Iowa (Ann. Code 1897 sec. 4625); Kansas (Gen. Stats. 1909 sec. 3837); Montana (Rev. Codes 1907 sec. 5017); Mis-

carriage] of another person, to-wit, M.... N.... in said complaint mentioned.

II. That no note or memorandum of such contract [expressing any consideration] was made in writing, or subscribed by the party to be charged therewith, to-wit, this defendant [or by his authorized agent] [but on the contrary, the same was wholly without consideration].

[*See note to Form 1925.*]

1928. The same, as to agreement in consideration of marriage.

That the said alleged agreement [*or* promise, *or* undertaking] in the complaint set forth was made upon consideration of marriage, and neither said agreement, nor any note or memorandum thereof [expressing the consideration] was ever in writing, and subscribed by the said C.... D...., who is sought to be charged therewith [or by his authorized agent].

[*See note to Form 1925.*]

1929. The same, as to sale of personal property.

That although said alleged contract was for the sale of goods [*or* chattels, *or* things in action] for the price of fifty dollars or more, no note or memorandum thereof was ever made in writing, and subscribed by the said C.... D.... sought to be charged thereby [or by his authorized agent] nor did the said [*buyer*] accept and receive any part of such

souri (R. S. 1909 sec. 2781-2784); Nebraska (R. S. 1913 sec. 2625, 2630); North Dakota (Rev. Codes 1905 sec. 5332); South Dakota (C. C. 1908 sec. 1238); Oklahoma (Comp. Laws 1909 sec. 1089); Texas (Civ. Stats. Ann. 1913 art. 3965); Utah (Comp. Laws 1907 sec. 2463); Washington (Rem. and Bal. Code 1910 sec. 5289, 5290); Wyoming (Comp. Stats. 1910 sec. 3751, 3752). In the above named states the memorandum may in all cases be signed by an authorized agent, except in Nebraska, Wyoming and Wisconsin, and in Wisconsin an authorized agent may subscribe to a lease for a period of more than one year or for the sale of lands or any interest therein. In the following states leases for a longer period than one year or contracts for the sale of real property or any interest in real property may be subscribed by an agent, but the authority of such agent must be in writing, subscribed by the party sought to be charged: California, Montana, North Dakota, South Dakota and Oklahoma. In Minnesota the contract of lease or sale, when made by an agent, is not entitled to record unless the authority of such agent be also recorded.

goods [*or* any of the evidences of such things in action]; nor did the said [*buyer*] at the time, pay any part of the purchase money.

[*See note to Form 1925.*]

1930. Ultra vires of corporation.

I. That the plaintiff [*or* said company] was not authorized by law to take, hold, and convey real property, except for the following purposes, and in the following manner [*here set forth the power of the corporation*].

II. That the deed alleged in the complaint was executed [and accepted] on the part of said corporation for the purpose of [*here state purposes and manner not within the power*].

1931. That the contract sued on is a foreign one, void by the law of the place.

I. That the [contract] alleged in the complaint was made without this state, and in the state of ..... [*or* in the kingdom of France] where the defendant was then domiciled.

II. That by an act of the legislature of said state, entitled "An Act, etc.," passed on, etc., it is enacted that [*here set forth the law relied on, and if there be exceptions, add allegations showing that the contract is not within them*].

1932. That the contract was a cover for a wager.

I. That at the time of the alleged contract the defendant was not a dealer in the merchandise mentioned therein, nor had he the possession or control of any thereof.

II. That it was the intent of the parties not to make any actual sale or delivery thereof, but at the maturity of said contract that the difference between the market value and the contract price should be paid by one party to the other.

III. That the market price of such merchandise at the maturity of the contract was, at the time of making the contract, contingent and uncertain; and the contract was a mere wager on the future market price thereof, and contrary to the statute.

1933. That the debt was for money lost at play.

I. That the defendant and the plaintiff played together at a game of chance called ..... for stakes, upon credit, and

not for ready money; and at said gaming the plaintiff won ..... dollars of the defendant, which he did not pay.

II. That thereafter the defendant gave the plaintiff the note mentioned in the complaint for said money so staked and lost.

1934. That the contract was made to compound a felony.

I. That heretofore, on the .... day of ....., 19.., at ..... one L.... M.... the son of the said defendant, had feloniously [*here designate the crime, e. g.* stolen, taken, and carried away a horse, the property of the plaintiff].

II. That the said defendant, in order to compound and settle said felony, executed the contract described in the complaint, in consideration of which, the plaintiff and others desisted from informing and prosecuting upon said felony.

III. That there was no other consideration for said contract.

1935. Note given for liquor sold without license (Melchoir v. McCarthy, 31 Wis. 252).

I. That the only consideration for said note was for the sale of strong or spirituous liquors, sold by said [*payee*] in quantities less than five gallons to said defendant in the town of ....., and county of ..... the said [*seller*] at the time of such sale, having no license for the sale thereof, as required by the Laws of 19.., either grocer or tavern license.

II. That the said note was transferred to the plaintiff after it was due, and without consideration, and after he had full notice of the foregoing facts.

1936. Usury by ante-dating security.

I. That he gave said bond and mortgage upon a loan made to him by the plaintiff, and which was first agreed for on the .... day of ....., 19.. [*or* to secure the purchase-money of lands conveyed to him by the plaintiff on the .... day of ....., 19.., on which day, and not before, said purchase-money accrued to the plaintiff].

II. That the said bond and mortgage were ante-dated as of the .... day of ....., 19.., upon an agreement between the parties that the defendant should secure and pay to the plaintiff, in addition to interest at the rate of seven per cent.

on said loan [*or* purchase-money] from said day, the further sum of ..... dollars as interest thereon from the day on which said bond and mortgage bore date, until the day above named, as a cover for usury.

III. That in pursuance of said usurious agreement, the said bond and mortgage were given, and thereafter said sum of ..... dollars was paid by the said defendant, and exacted and accepted by the plaintiff.

1937. That the contract was made on Sunday.

The defendant alleges that [the said promissory note in the complaint set forth was executed and delivered by this defendant, *or* the said goods and merchandise described in the complaint were sold and delivered to this defendant] on the first day of the week, commonly called Sunday, to-wit, on the .... day of ....., 19.., and not otherwise.

1938. Failure of consideration.

I. That defendant gave the [*name or describe the contract*] mentioned in the complaint to plaintiff solely in consideration of the performance by plaintiff of the covenants and conditions, upon his part contained, in a written agreement then made between them, of which the following is a copy: [*insert copy*].

II. That defendant duly performed all the conditions of said last named agreement on his part.

III. That plaintiff [*allege specifically the failure by the plaintiff to perform the covenants of the agreement as on his part showing the failure of consideration*].

CHAPTER XC.

PAYMENT, PERFORMANCE OR DISCHARGE OF THE CONTRACT SUED ON.

1939. Payment before action, and after action.
1940. Payment by accepted negotiable draft which plaintiff has lost, or negotiated.
1941. Suspension of remedy by note or draft not yet due.
1942. That plaintiff has taken a higher security by a bond.
1943. The same, by a judgment.
1944. Denying the promise as to part, and pleading payment or tender as to the balance.
1945. Denying value claimed, and pleading payment or tender.
1946. Payment in services.
1947. That a mortgage was given to secure the debt, under which the plaintiff took the mortgaged property.
1948. Novation, by substitution of new creditor.
1949. The same, in case of a promise to apply indebtedness upon a mortgage by the plaintiff.
1950. A demand before or after the plaintiff's tender.
1951. Performance of conditions precedent under statute.
1952. Tender of payment.
1953. Payment of part and tender of balance.
1954. Denial of part, and tender of residue.
1955. Compromise.
1956. Composition-deed.
1957. Rescission of contract.
1958. By surety, alleging an alteration of the contract.
1959. Traverse of plaintiff's general allegation of performance.
1960. Set-off.
1961. The same, by executors.
1962. The same, in an action by executors.
1963. Discharge in bankruptcy.
1964. Discharge under state insolvency law. (Wisconsin.)
1965. Payment by delivery of property.

These defenses are all affirmative in their nature, and must be specifically pleaded. Evidence to sustain them is not admissible under a general denial.

1939. Payment before action, and after action.

That before this action and on or about the .... day of ..... 19.., this defendant paid to the plaintiff ..... dollars in full [*or* in part] payment of the said note [*or other indebtedness*].

[*If payment was made after action*]:

That after the commencement of this action, and on or about the .... day of ....., 19.., this defendant paid to the plaintiff the sum of ..... dollars in full payment of the said note [*or* claim] set forth in the plaintiff's complaint, together with the further sum of ..... dollars, being the total amount of all costs which had accrued in this action at the time of said payment.

1940. Payment by accepted negotiable draft which plaintiff has lost, or negotiated.

I. That before the commencement of this action the plaintiff drew his negotiable draft on the defendant for the amount of said account [*or other indebtedness alleged*] dated on the .... day of ....., 19.., payable to the order of E.... F.... and indorsed by the said payee [*or* to his own order and indorsed by him] and due .... months after said date, which said draft was thereafter duly accepted by the said defendant so indorsed.

[*If draft was lost, continue*]:

II. That the plaintiff received said acceptance on account of said indebtedness, and afterwards and before the same became due and payable lost the same, and cannot produce it to the defendant.

[*If draft has been negotiated allege*]:

II. That the plaintiff received said acceptance on account of said indebtedness, and afterwards, and before the same became due and payable indorsed and delivered the same for value to some person to the defendant unknown, who from thence hitherto has been and now is the *bona fide* owner and holder thereof, and entitled to sue the defendant thereon.

1941. Suspension of remedy by note or draft not yet due.

That after the accruing of the alleged debt, and before this action, the defendant delivered to the plaintiff, and the plaintiff received from him, for and on account of said debt, a bill of exchange* drawn by the plaintiff upon, and accepted by the defendant [*or* a promissory note made by the defendant] dated the .... day of ....., 19.., for the sum of ..... dollars, payable to the plaintiff, or order, ... months

after date, ** which period had not elapsed at the commencement of this action.

[*If the draft was drawn by defendant on a third person, or by one third person upon another, insert between the * and ** in this form, the following*]: drawn by the defendant [*or* by M.... N....] on, and accepted by O.... P...., and indorsed by the defendant, whereby the defendant [*or* said M.... N....] required the said O.... P.... to pay the defendant or order ..... dollars, ... months after the date thereof.

1942. That plaintiff has taken a higher security by a bond.

I. That after said account [*or* note, *or other simple contract-debt*] became due, and before this action the plaintiff and this defendant agreed that the defendant should give the plaintiff his bond under seal [*or* should confess judgment to the plaintiff] for said sum so due.

II. That in pursuance of said agreement, this defendant, on the .... day of ....., 19.., gave to the plaintiff his bond under seal in the penal sum of ..... dollars, conditioned for the payment by him to said plaintiff of said sum of ..... dollars so due, on the .... day of ....., 19.., at ....., with interest.

1943. The same, by a judgment.

I. [*As in the preceding form.*]

II. That in pursuance of said agreement this defendant confessed judgment in the ..... court of ..... to the plaintiff for said sum; which judgment was on the .... day of ....., 19.., duly entered in the office of the clerk of the ..... court.

1944. Denying the promise as to part, and pleading payment or tender as to the balance.

I. The defendant denies that he at any time promised to pay the plaintiff for the goods and merchandise described in the complaint [*or* for the services set forth in the complaint] the sum of ..... dollars, and on the contrary alleges that he agreed to pay the plaintiff therefor the sum of ..... dollars, and no more.

II. That on or about the .... day of ....., 19.., and before the commencement of this action, the defendant paid to the said plaintiff the said sum of ..... dollars in full payment and discharge of the plaintiff's said claim.

[*Or in case of tender before action*]: II. That on or about the .... day of ....., 19.., and before the commencement of this action, the defendant duly tendered to the plaintiff the said sum of ..... dollars, in payment of the plaintiff's said claim, and that the said plaintiff then refused, and has ever since refused to receive the same, although the plaintiff ever since has been and still is ready and willing to pay the same to the plaintiff, and now brings the same into court and deposits the same for the benefit of the plaintiff.

1945. Denying value claimed, and pleading payment or tender.

I. The defendant denies that the goods and merchandise described in the complaint [*or* the services described in the complaint] were or are of the value of ..... dollars, as in said complaint alleged, and on the contrary the defendant alleges that the same were worth ..... dollars and no more [*or* did not exceed ..... dollars in value.]

II. [*Allege payment or tender, as in preceding form.*]

1946. Payment in services.

I. That after the said promissory note was made [*or* became payable] and before this action, to-wit, on the .... day of ....., 19.., the said plaintiff agreed to receive, and the said defendant agreed to give to the said plaintiff, his work as a carpenter, to the amount due and payable on the said note, which said work was to be received in payment of said note.

II. That the defendant afterwards, according to the said agreement, did for the said plaintiff carpenter work to the full amount due and payable on the said note.

1947. That a mortgage was given to secure the debt; under which the plaintiff took the mortgaged property.

I. That at the time of giving said note [*or incurring other debt alleged*] he gave a chattel mortgage upon said goods [*or*

briefly designate the subject of the mortgage, e. g., the household furniture in his dwelling at .....] which mortgage was upon condition that if the said note [*or other debt*] was not paid when due, the plaintiff might take the [*goods*] and dispose of them at public or private sale, and out of the avails retain the amount due [upon the note], with costs and expenses, paying over the surplus, if any, to the defendant.

II. That on the .... day of ....., 19.., and before this action, the plaintiff took possession of the [*goods*] to dispose of them; and that the same have not since been returned to the defendant.

III. That said [*goods*] were then of the value of ..... dollars, and exceeded the amount then due the plaintiff on said note [*or other indebtedness*] together with the necessary costs and expenses of foreclosure of said mortgage.

1948. Novation, by substitution of new creditor.

That on the .... day of ....., 19.., at ....., at the request of the plaintiff, he made his promissory note [*or*, his bond, under seal] to one M.... N.... for ..... dollars, in discharge of the indebtedness stated in the complaint.

1949. The same, in case of a promise to apply indebtedness upon a mortgage by the plaintiff.

I. That before the delivery by the plaintiff to the defendants of the goods in the complaint mentioned, the said goods, or part thereof, were mortgaged by the plaintiff to one M.... N...., who, by virtue of said mortgage, had a lien and control over the said goods, and the said plaintiff was unable to deliver them to the defendants; and in order that he might deliver said goods to the defendants, freed and discharged from the said mortgage, and all claim and lien of the said M.... N...., it was then and there agreed by and between the defendants and the plaintiff and said M..... N...., that in consideration that he, the said M.... N...., should and did, at the request of said plaintiff, release the said goods of and from all his lien and claim thereon, to the end that the same might be delivered by the plaintiff to the defendants free of said mortgage and lien; that the defendants should, before payment for said goods, deduct and retain out of any moneys that should be or become due from

them, enough to be applied to satisfy and discharge, so far as the same would extend, any sum which at the time of such payment should be due from plaintiff to M.... N.... on said mortgage.

II. That the said M.... N...., relying on such agreement, and in consideration thereof, did, after the making of said agreement, and before the delivery of said goods to the defendants, and at the request of said plaintiff, release and discharge the said goods from the said mortgage, and his claim or lien thereon.

III. That afterwards, upon an accounting between the parties, there was found due from the plaintiff to the said M.... N...., a sum exceeding the amount due from the defendants; namely, the sum of ..... dollars, and interest thereon from the .... day of ....., 19.., and of which the defendants then and there had notice.

IV. That the defendants thereupon paid to the said M.... N.... [*or*, at the request of said M.... N...., held and retained to and for his use and benefit] the said sum due from the defendants in payment and satisfaction, so far as the same would extend, of the said then existing indebtedness of the plaintiff to the said M.... N...., and which the said M.... N.... was then and there ready and willing should be applied, and it was applied, in satisfaction and discharge, so far as the same would extend, of the said then indebtedness of the said plaintiff to said M.... N...., in pursuance of the said agreement.

1950. A demand before or after the plaintiff's tender.

I. That before the making of the tender alleged [*or*, after the making of the tender alleged, and before this action], and on the .... day of ....., 19.., at ....., the defendant requested the plaintiff to pay him said sum [*or*, to deliver to him said deed, *or to perform the act in question, according to the fact*].

II. That the plaintiff then and ever since refused to pay [*or*, to deliver] the same.

1951. Performance of conditions precedent under statute.[1]

That before the commencement of this action the defend-

ant duly performed all the conditions of the contract set forth in the complaint on his part to be performed.

1952. Tender of payment.[2]

I. That before this action, and on the .... day of ....., 19.., at ..... this defendant tendered to the plaintiff ..... dollars in payment of said note and interest [*or other indebtedness*], but he refused to receive the same.

II. That this defendant has ever since remained, and still is, ready and willing to pay to the plaintiff said sum; but the plaintiff has hitherto refused to receive the same.

III. That this defendant now brings the said sum of ..... dollars into this court [*or if already paid into court:* that this defendant has paid said sum of ..... dollars into this court in this action] ready to be paid to the plaintiff, if he will accept the same.

1953. Payment of part and tender of balance.

I. That on or about the .... day of ....., 19.., and before the commencement of this action, this defendant paid to the plaintiff ..... dollars, in part payment of the said note [*or* account, *or other indebtedness*].

II. As to the residue of said claim, the defendant says that on the .... day of ....., 19.., at ..... he tendered [*continue as in preceding form*].

1954. Denial of part, and tender of residue.

I. [*As in Form 1944 or 1945.*]

II. That before this action, and on the .... day of

[1] This general method of pleading performance of conditions precedent is generally authorized by express statute. Wis. Stats. 1913 sec. 2674; Ariz. R. S. 1913 sec. 431; Ark. Dig. of Stats. 1904 sec. 6133; Cal. C. C. P. 1906 sec. 457; Colo. Code Ann. 1911 sec. 72; Idaho Rev. Codes 1908 sec. 4212; Iowa Ann. Code 1897 sec. 3626; Kans. Gen. Stats. 1909 sec. 5717; Mont. Rev. Codes 1907 sec. 6572; Minn. Gen. Stats. 1913, sec. 7776; Mo. R. S. 1909 sec. 1836; Neb. R. S. 1913 sec. 7696; N. Dak. Rev. Codes 1905 sec. 6872; S. Dak. C. C. P. 1908 sec. 139; Okla. Comp. Laws 1909 sec. 5662; Oregon Laws 1910 sec. 88; Utah Comp. Laws 1907 sec. 2991; Wash. Rem. and Bal. Code 1910 sec. 288; Wyo. Comp. Stats. 1910 sec. 4411.

[2] Rule XV of the Circuit Rules for Wisconsin provides money tendered must be paid into court and a certificate showing such payment served on the opposite party within five days after the pleading is served, or the tender becomes nugatory.

....., 19.., at ..... he tendered to the plaintiff ..... dollars in payment of said sum; but he refused to receive the same.

III and IV. [*As in paragraphs II and III of Form 1952.*]

1955. Compromise.

I. That before the commencement of this action, the plaintiff having demanded said sum [*or* said goods, *or otherwise*] from the defendant, the defendant refused to pay the same, because [*here state facts showing the claim a doubtful one*].

II. That the parties thereupon agreed to compromise said claim, and that the defendant should pay, and the plaintiff accept ..... dollars in satisfaction thereof.

III. That on the .... day of ....., 19.., in pursuance of said agreement, the defendant did pay and the plaintiff accepted said sum of ..... dollars in full satisfaction of the plaintiff's said claim.

1956. Composition-deed.

I. The defendant admits that on the .... day of ....., 19.., he was indebted to the plaintiff as alleged in the complaint.

II. The defendant further says that afterwards, and on or about the .... day of ....., 19.., the plaintiff, by his deed under seal, agreed with the defendant that the plaintiff would accept twenty-five per cent. of his said claim, to-wit, the sum of ..... dollars, then and there paid him by the defendant, in full satisfaction of said indebtedness, and that he would not sue the defendant on account thereof, and then and there did accept the same; and divers other creditors of the defendant then and there also, by the same deed, agreed to accept, and did accept, currently with the said plaintiff, the same percentage as that accepted by the plaintiff, in full satisfaction of the several debts to such creditors respectively due and owing from the defendant, and covenanted with the defendant not to sue the defendant for such respective debts.

1957. Rescission of contract.

That on or about the .... day of ....., 19.., after the

contract alleged in the complaint, and before any breach thereof, it was agreed by and between the plaintiff and the defendant that the said contract should be waived, abandoned, and rescinded; and they then waived, abandoned, and rescinded the same accordingly.

1958. By surety, alleging an alteration of the contract.

I. That the defendant gave said bond to the plaintiff as surety for one M.... N...., to secure the performance, on the part of said M.... N.... of [*here state the principal contract briefly; or, if in writing, it may be annexed, and referred to as a part of the complaint*].

II. That thereafter, and without the knowledge or consent of this defendant, the plaintiff agreed with said M.... N.... [by writing under seal, *here state modification*].

1959. Traverse of plaintiff's general allegation of performance.

That the plaintiff has not duly performed all the conditions of said contract on his part, but, on the contrary [*here may be set forth particular breach, as in complaints; and if the provision broken does not appear in the complaint, it may be stated thus:* although said contract contained a provision, of which the following is a copy: *copy of contract*], the plaintiff did not, etc.

1960. Set-off.

The defendant, for a counter-claim herein, alleges that before, and at the time of the commencement of this action, the plaintiff was, and still is, indebted to the defendant in the sum of ..... dollars, for the following cause*: [*here state the cause of action relied on as a set-off*], out of which said sum of money, so due to the defendant, he hereby offers to set off to the plaintiff so much as will be sufficient to satisfy the plaintiff's damages, if any, in respect to the alleged matters complained of [*or, if the cause of action in the complaint is admitted, say,* sufficient to satisfy the sum so due to the plaintiff].

1961. The same, by executors.

The defendant, for a counter-claim herein, alleges that the plaintiff before, and at the time of the death of the said M.... [*the defendant's testator*], was indebted to the said M.... [*or*, was at and before the commencement of this action indebted to the estate of the said M....], and still is so indebted to the estate of the said M.... in the sum of ..... dollars for the following cause [*here state the cause of action relied on as a set-off; and conclude as in the preceding form from the* *].

1962. The same, in an action by executors.

The defendant, for a counter-claim herein, alleges that the said M.... [*the plaintiff's testator*], before and at the time of his death, was indebted to the defendant [*or, if the executors-plaintiff were indebted in the representative capacity*, before and at the time of the commencement of this action, the plaintiffs, as the executors of M.... were, and still are, indebted to the defendant] in the sum of ..... dollars, for the following cause [*continue as in preceding form*].

1963. Discharge in bankruptcy.

I. The defendant alleges that on the .... day of ....., 19.., and for more than six months immediately prior thereto, he was a resident of the city or ..... in the county of ..... and state of ....., within the jurisdiction of the United States district court for the .... district of ..... and that on said date he was insolvent and a bankrupt within the meaning of the act of Congress entitled "An Act to establish a Uniform System of Bankruptcy throughout the United States," approved July 1, 1898, and then and there owed debts which had not been created in consequence of fraud, embezzlement, misappropriation, or defalcation as a public officer, or as an executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity, and which he was unable to pay.

II. That on said .... day of ....., 19.., defendant filed in the district court of the United States for the .... district of .....a petition, wherein he set forth that for the greater portion of six months next immediately preceding the filing of his said petition, he had been a resident of the said city of

..... within said judicial district, and that he owed debts which he was unable to pay in full; and wherein was set forth a list of his creditors and the places of their respective residence, and that said debts were not created by his fraud, embezzlement, misappropriation or defalcation, while acting as a public officer or as an executor, administrator, guardian, or trustee, or in any fiduciary capacity; and wherein was also set forth an accurate inventory of all his property both real and personal, including his rights, credits and effects of every kind and nature, which petition was duly verified by his oath, and wherein he prayed that he might be adjudged by said court to be a bankrupt within the purview of the act of congress aforesaid; and that such proceedings were thereafter had upon said petition that on the .... day of ....., 19.., this defendant was by said court duly adjudged a bankrupt.

III. That on the .... day of ....., 19.., the defendant filed in said court a petition praying that he might be discharged from all his debts, and that a certificate of such discharge might be issued to him, and that on the .... day of ....., 19.., notice was duly issued to all the creditors of defendant and all parties interested in said proceedings in bankruptcy, to appear in said court on the .... day of ....., 19.., and show cause why such discharge should not be granted.

IV. That on said .... day of ....., 19.., defendant having complied with all the requirements of the act of congress relating to bankruptcy, and all orders of the court, was declared by said court entitled to be discharged from his debts as prayed for, and a decree was duly made and entered by said court in said bankruptcy proceedings on said .... day of ....., 19.., that defendant be discharged from all debts and claims provable under said act of congress against his estate, and which existed on the .... day of ....., 19.., except such debts as are by laws excepted from the operation of a discharge in bankruptcy, and a certificate of said discharge was duly issued to defendant, a copy of which is hereto attached and made a part hereof, marked Exhibit A.

V. That the cause of action which is the basis of the plaintiff's complaint was due and owing to plaintiff at the date of the filing of said petition to be declared a bankrupt, and upon the date of the said adjudication in bankruptcy,

and was included in the schedule of debts owing by said bankrupt filed with the aforesaid petition. That said debt was a debt provable against the estate of this defendant in bankruptcy and was not a debt created by his fraud, embezzlement, misappropriation, or defalcation while acting as a public officer, or as an executor, administrator or guardian or trustee, or while acting in any other fiduciary capacity.

1964. Discharge under state insolvency law (Chap. 80 Wis. Stats. 1913).

I. The defendant alleges that on the .... day of ....., 19.., he was a resident of the city of ..... in the county of ....., in said state, and was insolvent, within the meaning of Chapter 80 of the statutes of the state of Wisconsin for the year 19..; and that on said day he made, executed and delivered to one G.... H...., then a resident of said state, a voluntary assignment of all his property, real and personal, for the benefit of and in trust for his creditors; that before taking upon himself the trusts conferred upon him by said assignment, the said G.... H.... delivered to the county judge of ..... county his bond, with two sufficient sureties, duly executed and conditioned according to law, in the sum of ..... dollars, being a sum greater than the whole amount of the nominal value of the assets of the defendant so assigned, which bond was duly approved according to law. That the said assignee G.... H...., was not and is not a creditor of this defendant, that he duly consented in writing to take upon himself the faithful discharge of the several trusts specified in said assignment; that a full and true copy of said assignment, indorsed with such consent, was presented to the said county judge and certified by him to be a true copy of the original assignment, and of the whole thereof, and thereupon the said copy of said assignment, together with the said bond, were duly filed in the office of the clerk of said court of ..... county, and said county judge having first indorsed upon said copy of said assignment his further certificate that the said assignee did in his presence indorse upon the same his consent, as provided by section 1696 of said statutes, and that all the proceedings required by law, and especially by chapter 80, were duly had and taken.

II. That within twenty days after the execution of the said assignment this defendant made and filed in the office of the clerk of said court a correct inventory of his assets, and a list of his creditors, stating the place of residence of each creditor and the amount due to each, which inventory and list were each verified by the oath of the defendant and had affixed thereto a certificate of the said G.... H.... that the same were correct to his best knowledge and belief, and that the name of the plaintiff, with his place of residence and the amount due to him upon the claim set forth in the complaint was included in said list; that within twenty-two days after the execution of said assignment, as this defendant is informed and believes, the said G.... H.... as assignee aforesaid, gave notice of the making of said assignment, and of the post office address of said assignee, and that every creditor of the said defendant was required to file, within three months, with said assignee or the clerk of said circuit court, naming him and giving his post office address, on pain of being debarred of dividend, an affidavit setting forth his name, residence and post office address, and the nature, consideration and amount of his debt, over and above all off-sets; that such notice was given by publishing the same once in each week for three successive weeks in a newspaper, to-wit, the Q.... Z.... in the said county of ..... and by mailing a copy of said notice to each creditor of the defendant at his residence of whom the said assignee had information, and that a copy of said notice was duly mailed to the plaintiff.

III. That at the expiration of three months from the first publication of said notice, and on the .... day of ....., 19.., said assignee filed with the clerk of said court due proof of publication of the same, with a list of the creditors to whom such notice was mailed, with the dates thereof, respectively, verified by his affidavit, and also a list of the creditors from whom affidavits of claims had been received by himself or said clerk, stating the names, residences, and amounts claimed, respectively, together with all affidavits of claims by him received.

IV. That this defendant, desiring to be discharged from his said debts, did within one year after the filing of the copy of his assignment in the office of the clerk of the circuit court as aforesaid, and before the final settlement of the accounts of

said assignee, file in the office of the clerk of said circuit court, and did present to said circuit court his application for discharge from his debts, addressed to said court, in which application he stated the date of the filing of such assignment in the clerk's office where the same was filed, with name and post office address of the said claim and of the assignee named in such assignment, which application was signed by this defendant and had annexed thereto his affidavit subscribed and sworn to by him, as required by section 1702c of said chapter 80 aforesaid.

V. That upon the filing of said petition as aforesaid, such proceedings were thereafter taken thereon that this defendant was by the said court, by an order and judgment duly made and entered by said court on the .... day of ....., 19.., duly discharged from all his debts and liabilities existing at the time of the making of said assignment, to-wit, on the .... day of ....., 19.., and from each and every one of the said debts and liabilities, a copy of which order and judgment is hereto annexed marked Exhibit A and made part of this answer.

VI. That thereupon the clerk of the said court did immediately enter judgment on the judgment docket thereof against this defendant in favor of each of his said creditors, including the plaintiff, for the amount of his said claim or debt against this defendant, and also entered and discharged all said judgments upon the said docket by the order of said court.

WHEREFORE defendant demands that the complaint of the plaintiff be dismissed.

1965. Payment by delivery of property.

That before the commencement of this action, and on or about the .... day of ....., 19.., it was agreed between the plaintiff and defendant that the defendant should turn over and deliver to the plaintiff one certain horse, the property of the defendant [*or* transfer and assign to the plaintiff one certain promissory note executed by M.... N...., *describe note*, the property of defendant, *or otherwise describe the property according to the facts*], and that the plaintiff should receive the said [*horse or other property*], in full payment and satisfaction of the plaintiff's claim against the

defendant described in the complaint, and that in accordance with said agreement the defendant did on the .... day of ....., 19.., deliver to the plaintiff said horse [*or* assign and deliver to the plaintiff said note], whereby the said plaintiff's claim became fully paid, satisfied and discharged.

CHAPTER XCI.

DEFENSES IN ACTIONS FOR MONEY HAD AND RECEIVED.

1966. Denial of loan.
1967. Allegation of payment by sale of collateral.
1968. Denial of receipt of money.
1969. Denial of request to pay money to another.
1970. Usury.
1971. Accounting and payment.
1972. That a surety had collateral on which he has realized.
1973. That plaintiff's co-surety has secured property of principal.

1966. Denial of loan.

This defendant denies that the plaintiff, on the .... day of ....., 19.. [*date mentioned in the complaint*], or at any other time, loaned to the defendant the money described in the complaint, or any part thereof.

1967. Allegation of payment by sale of collateral.

The defendant alleges that on or about the .... day of ....., 19.., he delivered to the plaintiff [*describe the property*], as collateral security for the repayment of the said loan [*or*, to indemnify the said plaintiff against all liability arising from the execution of the undertaking], described in the complaint, and that on or about the .... day of ....., 19.., the plaintiff sold the said [*describe collateral*], and realized upon such sale and still retains the sum of ..... dollars, which sum is greater than the amount of said loan [*or*, the amount paid by the plaintiff upon said undertaking], with interest thereon up to the time of such sale. [*If the amount received be less than the plaintiff's claim, state the fact as a partial defense.*]

1968. Denial of receipt of money.

This defendant denies that at the times named in the complaint, or at any other time, he received the money mentioned in said complaint or any part thereof.

1969. Denial of request to pay money to another.

I. This defendant denies that he at any time requested the plaintiff to pay any money to said [*naming the person to whom, or object for which, the payment is alleged to have been made*].

II. This defendant denies that he at any time promised to pay any money to the plaintiff on account of any money paid to the said M.... N....

1970. Usury.

That the loan alleged in the complaint was made to the defendant by the plaintiff on the corrupt and unlawful agreement between them, that the plaintiff should reserve and secure to himself, and the defendant would pay to him, for the use of said sum, a greater sum than at the rate of [seven] per centum per annum, to-wit [*here state the interest or compensation agreed on; and payment of it, if it has been paid*].

1971. Accounting and payment.

That on the .... day of ....., 19.., this defendant accounted with and paid over to the plaintiff all moneys received by this defendant, up to that day, as such agent of the plaintiff.

1972. That a surety had collateral on which he has realized.

I. That at the time of the execution of the bond [*or* undertaking on appeal *or otherwise describe the obligation which plaintiff claims to have paid as a surety for defendant*] mentioned in the complaint, defendant deposited with plaintiff [*describe collateral*] of the value of ..... dollars; that it was agreed between them that, if the plaintiff should be compelled to pay any sum for the defendant by reason of the execution of said bond [*or* undertaking] plaintiff should sell such [*describe collateral*] and apply the proceeds in satisfaction and discharge of the money he should have so paid the defendant; that the plaintiff has sold the same and has received therefor the sum of at least ..... dollars, which he has retained and applied to the discharge of the claim alleged in the complaint [*or* in partial discharge, *as the fact is*].

1973. That plaintiff's co-surety has secured property of principal.

I. That on or about the .... day of ....., 19.., the plaintiff received from E.... F.... certain property of the value of ..... dollars, and consisting of [*briefly describe*]; that such property was delivered to plaintiff by [said E.... F....] for the purpose of applying the same in satisfaction of the payment alleged in the complaint, which plaintiff then and there agreed to do.

II. That thereafter the plaintiff sold said property, and received as proceeds thereof the sum of ..... dollars, which he has retained and applied in satisfaction of the payment set forth in the complaint [*or if the property has not been sold allege that the plaintiff has retained the same and converted it to his own use*].

CHAPTER XCII.

DEFENSES IN ACTIONS FOR GOODS SOLD.

1974. Denial of necessaries.
1975. Allegation that credit is unexpired.
1976. Denial of plaintiff's title.
1977. That plaintiff agreed to take note in part payment.
1978. Counter-claim for breach of warranty.
1979. Counter-claim by way of set-off against plaintiff's factor.
1980. Payment in part, and deficiency in the goods exceeding the balance, with counter-claim for excess.
1981. Rescission of contract by plaintiff.
1982. Title in a third party.
1983. Payment in services.
1984. Return of machine after trial, as unsatisfactory.
1985. Recoupment for breach of warranty on sale by sample.

1974. Denial of necessaries.

The defendant denies that the articles mentioned in the plaintiff's complaint, or any part thereof, were furnished to the defendant's said wife [*or* child] with the knowledge or consent of this defendant, and denies that the same, or any part thereof, were necessary for the use of said wife [*or* child].

1975. Allegation that credit is unexpired.

The defendant alleges that said sale was upon a credit of .... months from the .... day of ....., 19.., which time had not expired at the commencement of this action.

1976. Denial of plaintiff's title.

The defendant denies that the goods, wares, and merchandise mentioned in the complaint, or any part thereof, were ever sold by the plaintiff to this defendant, and alleges that no part of the said goods, wares, and merchandise was the property of the plaintiff when sold to this defendant; but the same then were the property of one M.... N...., who sold the same to this defendant.

1977. That plaintiff agreed to take note in part payment.

I. That the said goods were sold and delivered to the said defendant by the said plaintiff on an express agreement, by and between them, that the said plaintiff should accept in part payment therefor, to the extent of ..... dollars, a promissory note for that sum drawn by this defendant [*or*, by one M.... N....], and dated on the .... day of ....., 19.., and payable on the .... day of ....., 19.. [with an approved indorser]; and the residue, ... dollars, in cash.

II. That on the .... day of ....., 19.., and before this action, the defendant tendered to the plaintiff such a note as above described [indorsed by one O.... P...., who was then, and still is, a merchant at ....., in good credit and ability, and an approved indorser], and is still ready and willing to deliver the same.

III. That the defendant refused to receive the same.

IV. As to the residue, ... dollars, the defendant alleges [*allege payment or tender, as in forms in chapter XC*].

1978. Counter-claim for breach of warranty.

The defendant, for a counter-claim herein, alleges that at the time of the sale of the said goods in the complaint mentioned, the said plaintiff represented and warranted that [*here state the warranty claimed and allege breach and damage following substantially the forms given in chapter XLIV of this work, with such changes as may be necessary, and close with demand for judgment*].

1979. Counter-claim by way of set-off against plaintiff's factor.

I. The defendant, for a counter-claim herein, alleges that the goods mentioned in the complaint were, with the privity of the plaintiff, sold and delivered to the said defendant by one M.... in his own name as the sole owner, and as and for his own goods.

II. That said M.... was in fact the agent and factor of the plaintiff in respect to said goods.

III. That the plaintiff did not appear, and was not known by the defendant at or before the time of the sale and de-

livery to be the owner of the goods, or in any way interested therein.

IV. That the defendant bought and accepted the goods of and from M.... as the true and sole owner and seller; and that credit for the said goods was given to the defendant by the said M...., and not by the said plaintiff.

V. That the said M...., before and at the time of the sale and delivery of the said goods was, and still is, indebted to the defendant for the following cause [*continue as in Form 1427 from the* *].

[*Demand for judgment.*]

1980. Payment in part, and deficiency in the goods exceeding the balance, with counter-claim for excess.

I. For a counter-claim, the defendant alleges that the plaintiffs have brought this action, as defendant is informed and believes, to recover a balance claimed to be due for mirrors, and other articles furnished to, and for work and labor done for, this defendant by the plaintiffs, on various days between the .... day of ....., 19.., and the .... day of ....., 19..; that the total amount of the account of said mirrors and other articles, and said work and labor, as made out and presented by the plaintiffs, was the sum of ..... dollars.

II. That the defendant paid to the plaintiffs from time to time various sums of money on account of said mirrors and other articles, and work and labor, amounting in all to the sum of ..... dollars, and redelivered to said agent certain articles, to-wit, [*describe the articles*], of the value of ..... dollars.

III. That it was agreed between this defendant and the plaintiffs that all mirrors furnished to the defendant should be perfect and true mirrors, and in every way satisfactory to the defendant; and that if any of them upon trial should prove to be untrue or imperfect, the same should be taken back by the plaintiffs, and others substituted in their stead.

IV. That among the articles furnished by the plaintiffs to this defendant under said agreement, and included in said account was one pier-glass, three mantel mirrors, and four gilt cornices, which were charged in gross in said account, at

the price of ..... dollars. That the said three mantel mirrors above mentioned proved, upon examination and trial, to be untrue and imperfect; that they were entirely unsatisfactory to this defendant; that he promptly notified the plaintiffs of the deficient and unsatisfactory quality and character of said mirrors, and requested them to take them away, and replace them with true and perfect mirrors; but they have never complied with the request of this defendant in this regard. That the defendant has at all times been, and still is, ready to redeliver said mirrors to said plaintiffs. That the same, if true, perfect, and satisfactory, would have been worth about the sum of ..... dollars, at the price that such mirrors were to have been furnished, under the agreement between the plaintiffs and this defendant; but that they were worth at least ..... dollars less, on account of their deficient character. And the defendant claims that the deficiency in value of said mirrors, to-wit, the sum of ..... dollars, should be deducted from said account.

WHEREFORE, the defendant demands that the said sum of ..... dollars be allowed and adjudged as due this defendant upon this counter-claim, and that he have judgment against the plaintiffs for the excess thereof over and above the plaintiffs' claim herein, and that he recover his costs of this action.

1981. Rescission of contract by plaintiff.

That after the delivery of the goods named in the complaint and on or about ....., 19.. the plaintiff elected to rescind the sale thereof and demanded from defendant the return of said goods, upon the ground that this defendant had been guilty of fraudulent misrepresentations which had induced plaintiff to make the sale; that defendant thereupon agreed with plaintiff that the said sale might be rescinded, and they then and there rescinded the same, and defendant delivered said goods to plaintiff and plaintiff received the same from defendant in full satisfaction and discharge of any and all claim arising out of the transaction alleged in the complaint.

1982. Title in a third party.

Denies that said goods were the property of plaintiff at the time of the alleged sale and alleges that they were then the property of one E.... F.... and that on ....., 19.., the said E.... F.... demanded possession thereof from defendant and threatened to begin legal proceedings against defendant to obtain possession thereof, [*or* to obtain payment therefor], and thereupon defendant paid to the said E.... F.... ..... dollars, the full value thereof.

1983. Payment in services.

That on ....., 19.., it was agreed between plaintiff and defendant that defendant should render to plaintiff his services as [*state capacity in which services were to be rendered*] at the rate of ..... dollars per day, to an amount equal at such rate to the amount of the plaintiff's claim set forth in the complaint and in payment thereof; that thereafter and under said agreement defendant rendered such services to plaintiff equal in value at such rate to the full amount of such claim.

1984. Return of machine after trial as unsatisfactory.

That the machine described in the complaint was sold to him by plaintiff upon the condition that he might take it and give the same a fair trial, and that if it did not work satisfactorily to him he might return it to the plaintiff; that defendant took the machine on that condition and gave it a fair trial for ..... days, but it did not work satisfactorily to him, and on ....., 19.., he returned it to plaintiff for that reason.

1985. Recoupment for breach of warranty on sale by sample.

I. That the goods mentioned in the complaint were bought by the defendant of the plaintiff by samples which represented sound and merchantable goods suitable for [*state what*] which goods plaintiff agreed should in all respects be equal to such samples, and defendant purchased said goods, relying upon plaintiff's said agreement.

II. That in the month of ..... thereafter, plaintiff delivered to defendant [*state amount delivered*].

III. That, relying upon said agreement and warranty made by plaintiff, defendant accepted and paid for the goods so delivered the contract price, to-wit, ... dollars.

IV. That thereafter, and without knowledge of their real condition, defendant sold and delivered a portion of said goods to his customers; that said customers afterwards returned the same as defective, and refused to keep or pay for them; that thereupon defendant examined all of the said goods delivered by plaintiff, and found that no part thereof corresponded with said samples, but said goods were imperfect, unmerchantable and wholly unfit for [*state purpose*] and of little or of no value.

V. That defendant immediately notified plaintiff of the character and condition of said goods as aforesaid, and offered to return the same, but plaintiff refused to receive them or to return to defendant the price paid therefor.

VI. That said goods are worthless for the purpose for which defendant purchased them, and are worth ..... dollars less than they would have been worth if they had been in all respects equal to the samples exhibited by plaintiff to defendant, which said sum defendant asks shall be deducted from the amount, if any, which may be proved against him on the trial of this action.

CHAPTER XCIII.

DEFENSES IN ACTIONS FOR SERVICES.

1986. Accounting and payment.
1987. Counter-claim against carrier for negligence.
1988. Plaintiff's work not finished, and architect's certificate not obtained.
1989. Modification of contract and subsequent breach.
1990. Deduction for delay in building contract.

1986. Accounting and payment.

I. The defendants deny each and every allegation in said complaint, except what is hereinafter admitted.

II. The defendants, admitting that said plaintiff did, at the request of defendants, enter into the service of the defendants as [salesman], as stated in the complaint allege that they did account with said plaintiff on the .... day of ....., 19..; and that on said accounting there was found due said plaintiff only the sum of ..... dollars.

Second. For a further defense, the defendants allege that before the commencement of this action they paid to said plaintiff said sum of ..... dollars, so found due upon the accounting hereinbefore alleged, in full of the plaintiff's claims.

1987. Counter-claim against carrier for negligence.

The defendant, further answering and by way of counter-claim herein, alleges: that the transportation of the goods mentioned in the complaint was conducted so badly and negligently, and with so little care, that by the mere carelessness, negligence, and improper conduct of the said plaintiff and his servants in that behalf, a part of the said goods, of the value of at least ..... dollars, were wholly lost to the defendant; and a part thereof, of the value of ..... dollars, were damaged in the sum of ..... dollars; which said loss and damages, amounting to the sum of ..... dollars, the defendant claims the right to counter-claim and set off against the plaintiff's demand to the extent

thereof; and the defendant demands judgment against said plaintiff for the said sum of ..... dollars, or so much thereof as he may be entitled to over and above the plaintiff's claim.

1988. Plaintiff's work not finished, and architect's certificate not obtained.[1]

I. The defendant alleges that the said labor and services set forth in the complaint were performed by the said plaintiff in and about the execution and construction of a certain dwelling house, the property of this defendant, and were performed under the terms of a certain written contract between plaintiff and defendant, by the terms of which it was provided [*here set forth provisions of contract relied on*].

II. That the said work was not completed in a good and workmanlike manner, on or before the day limited therefor in the said contract, but on the contrary, the said work on that day, and from thence to the commencement of this action, was and still is, incomplete and unfinished, in this [*here state particulars*].

III. That no certificate from the said architect, that the said work had been completed to his satisfaction, was obtained by the plaintiff before this action.

1989. Modification of contract and subsequent breach.

I. That after the making of the agreement alleged in the complaint, and on or about the .... day of ....., 19.., it was mutually agreed between plaintiff and defendant that said agreement should be, and the same was, then and there modified as follows: [*set forth modification particularly and fully*].

II. That plaintiff did not perform the conditions of said agreement as so modified, in this that he did not [*state specifically the failure*].

[1] Where the plaintiff sets forth the contract and pleads due performance of its conditions, failure to fully complete the work and obtain the architect's certificate will probably be admissible under a general denial, but if the action be simply brought to recover for services it will be necessary to set out the contract and plead the breaches as in this form.

1990. Deduction for delay in building contract.

I. That it was expressly agreed in the contract set forth in the complaint that said building should be completed on the .... day of ....., 19.. and that if not completed at that time the plaintiff should forfeit from the contract price the sum of ..... dollars per day for each day after said .... day of ....., 19.., during which said building remained incompleted and that the same should be deducted from said contract price as liquidated damages for said delay.

II. That plaintiff did not complete said building until the .... day of ....., 19.., a period of .... days later than agreed, whereby defendant is entitled to deduct the sum of ..... dollars from the price mentioned in the said agreement.

CHAPTER XCIV.

DEFENSES IN ACTIONS ON BILLS, NOTES AND CHECKS.

1991. Denial of execution or acceptance.
1992. Denial of genuineness of signature.
1993. Denial of indorsement.
1994. Denial of plaintiff's ownership.
1995. That defendant indorsed as agent only.
1996. Mistake in amount of note.
1997. Alteration of the instrument.
1998. Usury in making note.
1999. The same, another form.
2000. The same, another form, where tender of principal is necessary, and interest only is forfeited. (Wisconsin.)
2001. Usury, where interest only is forfeited.
2002 Want of consideration.
2003. Failure of consideration.
2004. That the acceptance was for accommodation.
2005. That the note was for accommodation, and was misapplied.
2006. That the note or acceptance was given for goods sold, but never delivered.
2007. That the notes were given for purchase money, and plaintiff failed to convey.
2008. That the note was for goods sold by means of deceit.
2009. That the note was for goods sold with a false warranty.
2010. Counter-claim for breach of warranty.
2011. That the note was given on a purchase of diseased sheep and that they injured other sheep of the defendant.
2012. That the note was induced by plaintiff's fraud, general form.
2013. Denial of transfer to the plaintiff.
2014. Qualified admission of note, and denial of plaintiff's title.
2015. Wrongful transfer by partner.
2016. Denial of validity of transfer of note by moneyed corporation.
2017. By accommodation indorsers, alleging extension given to makers.
2018. That defendant was a surety, and that plaintiff holds collateral securities to which defendant asks to be subrogated.
2019. Denial of acceptance, presentment and protest.
2020. Denial of notice.
2021. Denial of presentment.
2022. Denial of excuse for non-presentment.
2023. Breach of special agreement as to presenting and giving notice.
2024. Payment of bill, to drawer, before indorsement.
2025. Fraudulent representations as to the character of the instrument.
2026. That note was given to compound a felony.

1991. Denial of execution or acceptance (see following form).

The defendant denies that he [*or* E.... F....] at any time executed or delivered the promissory note [*or* accepted the bill of exchange] set forth in the complaint.

1992. Denial of genuineness of signature.[1]

The defendant specifically denies that he at any time signed or executed the said supposed promissory note set forth in the complaint herein, and alleges that if the name of this defendant appears upon said promissory note, either as maker or indorser, the said signature is a forgery.

[*Verification.*]

1993. Denial of indorsement.

The defendant denies that he [*or* E.... F....] at any time indorsed or delivered the promissory note [*or* bill of exchange] described in the complaint herein.

1994. Denial of plaintiff's ownership.

The defendant denies that the promissory note described in the complaint is owned or held by the plaintiff, and denies that the same was so owned or held at the time of the commencement of this action, and on the contrary thereof this defendant alleges that the said note was then and is now the property of and held by one E.... F....

[1] There are statutes in a number of states providing substantially that unless a defendant specifically deny by affidavit or verified pleading the signature to a contract or instrument which is sued on, the mere production of the instrument is *prima facie* evidence of its execution. Under these statutes it has been frequently held that a verified general denial is insufficient to throw the burden of proof on the plaintiff. Cowing v. Peterson, 36 Minn. 130; 30 N. W. 461. The form here given is adapted from the answer which was held sufficient in Ludlow, et al. v. Berry, 62 Wis. 78; 22 N. W. 140. See Wis. Stats. 1913 sec. 4192; Ariz. R. S. 1913 sec. 1750; Ark. Dig of Stats. 1904 sec. 3108; Cal. C. C. P. 1906 sec. 447, 448; Colo. Code Ann. 1911 sec. 68; Idaho Rev. Codes 1908 sec. 4200-4202; Iowa Ann. Code 1897 sec. 3640; Kans. Gen. Stats. 1909 sec. 5703; Minn. Gen. Stats. 1913 sec. 8448; Mo. R. S. 1909 sec. 1985; Tex. Civ. Stats. Ann. 1913 art. 3710; Utah Comp. Laws 1907 sec. 2984; Wash. Rem. and Bal. Code 1910 sec. 1263.

1995. That defendant indorsed as agent only.

I. The defendant denies that he ever indorsed the promissory note described in the complaint in his individual capacity, and denies that he ever placed his name thereon in any manner, save as hereinafter particularly stated.

II. This defendant says that the following is a true copy of the promissory note made by the said firm of A.... & Co., and on which this action is brought [*copy of note and indorsement, with addition of "Treasurer" to defendant's signature*].

III. That at the time of the making and indorsement of said note this defendant was the treasurer of the ..... company, at ....., a foreign corporation, duly incorporated by and under the laws of the state of .....; and that he was authorized by them to receive the said note, and to indorse the same to the plaintiffs, as such treasurer, of all which facts the plaintiffs had notice.

IV. That said corporation was, at the time of said indorsement, indebted to the plaintiffs to the amount of about ..... dollars, for goods, wares, and merchandise, furnished by the said plaintiffs to the said corporation; and said note was received and indorsed by him as such treasurer, and not in his individual capacity, and was received by the plaintiffs as an obligation of the said corporation, on account of said precedent debt due to them from the said corporation, and for and on account of no other consideration whatever, and that he received no consideration therefor.

1996. Mistake in amount of note.

That said note was given upon a settlement of account between the defendant and the plaintiff, and was intended by them to be made and received for the sum of ..... dollars, then claimed by the plaintiff to be the amount due him from this defendant; but that when it was made, by mistake of the parties, given for the sum of ..... dollars mentioned in the complaint, instead of the sum of ..... dollars, which was all that was due; and as to the excess, to-wit, ... dollars, the same is without consideration.

1997. Alteration of the instrument.

That after making [*or* acceptance] and issue of said note [*or* bill] and before this action, the plaintiff materially altered

the said note [*or* bill] without the consent of the defendant, by adding the signature of M.... N.... as a joint maker thereof [*or* by cutting off the signature of M.... N...., who was a joint maker thereof, *or* by adding the words "payable at ....," *or otherwise, as the case may be*].

1998. Usury in making note.[2]

I. That the note mentioned in the complaint was made and delivered to the plaintiffs upon the usurious agreement between the defendant and the plaintiffs, that the defendants should pay the plaintiffs, and that the plaintiffs should reserve and secure to themselves, for the loan of money, a greater sum than at the rate of .... per cent. per annum, to-wit, at the rate of .... per cent. per annum [besides a commission of .... per cent., on the face of said note].

II. That said sum was deducted and reserved from the amount of said note by the plaintiffs, and the balance only paid to this defendant; that is to say, that this defendant agreed to pay, and the plaintiffs agreed to receive ..... dollars for said loan, the plaintiffs reserving and securing to themselves for the loan of money on said note, until the maturity thereof, ... dollars.

[*The foregoing may be sufficient in states where, as in Minnesota, usurious contracts are invalid, but where, as in other states covered by this work, the principal may be recovered and the interest alone becomes forfeited there should be added another paragraph, as follows:*]

III. The defendant admits that there is due and owing to the plaintiff upon said note the sum of ..... dollars [*principal sum*]. [*In Wisconsin insert:* and upon the trial of this action will prove a tender of said last named sum to the said plaintiff] but defendant specifically denies that any greater sum than said sum of ..... dollars is due the plaintiff upon said note.

[2] The defense of usury cannot be raised under a general denial; the facts of the supposed usurious agreement must be specifically pleaded. And when a foreign usury statute is relied on the foreign law must be set out, and also the facts which show that the agreement was governed by that law and void under it. Curtis v. Masten, 11 Paige (N. Y.) 15.

In the following states the interest only is forfeited and the principal may be recovered: Wis. Stats. 1913 sec. 1690-1692; Ariz. R. S. 1913 sec. 3505-3509; Idaho

1999. The same, another form.

That he gave to the plaintiff the note mentioned in said complaint, in pursuance of a mutual agreement between the plaintiff and defendant, that the plaintiff should lend the defendant the sum of ..... dollars from the .... day of ....., 19.., until the .... day of ....., 19.. [*or* until demand], upon interest at the rate of .... per cent, per annum [*or* .... cents per day on each one hundred dollars].

II. That the defendant received from the plaintiff ..... dollars only, as consideration for the said note; the plaintiff retaining ..... dollars, as interest thereon.

[*See note to last preceding form.*]

2000. The same, another form, where tender of principal is necessary, and interest only is forfeited (Wisconsin).

As a partial defense to this action the defendant alleges:

I. That before the making of the said promissory note described in the plaintiff's complaint, it was usuriously and corruptly agreed that the plaintiff should lend to the defendant the sum of ..... dollars, and that the defendant should

Rev. Codes 1908 sec. 1537-1540; Iowa Ann. Code 1897 sec. 3038-3041; Kans. Gen. Stats. 1909 sec. 4345, 4346; Neb. R. S. 1913 sec. 3350; N. Dak. Rev. Codes 1905 sec. 5510-5513; S. Dak. C. C. 1903 sec. 1417-1419; Tex. Civ. Stats. Ann. 1913 arts. 4980, 4982; Wash. Rem. and Bal. Code 1910 sec. 6255; Wyo. Comp. Stats. 1910 sec. 3359. In Wisconsin a tender of the principal sum must be shown in order to entitle the defendant to any relief.

In Arkansas (Ark. Dig of Stats. 1904 sec. 5389, 5390, 5393) all usurious contracts are wholly void, and in Minnesota (Minn. Gen. Stats. 1913 sec. 5807) the same rule maintains except so far as negotiable instruments in the hands of a *bona fide* holder are concerned. In Missouri (Mo. R. S. 1909 sec. 7182, 7183) only the legal rate can be recovered; in Oregon (Oregon Laws 1910 sec. 6029-6031) if higher than legal rate is contracted for, it works a forfeiture of the entire debt to the school fund of the county where suit is brought, except in the case of a *bona fide* assignee of such usurious contract; in Utah (Utah Comp. Laws 1907 sec. 1241x-1241x11) the court may declare any usurious contract void and enjoin prosecution thereon.

In California and Montana the parties may agree in writing for the payment of any rate of interest (Cal. C. C. 1906 sec. 1918; Mont. Rev. Codes 1907 sec. 5212) and the agreement will be enforced; in Colorado the parties to any bond, bill, promissory note, or other instrument of writing, may stipulate therein for the payment of a higher rate of interest than eight per cent (the legal rate), and the agreement will be enforced. Colo. Stats. Ann. 1911 sec. 3163.

pay the plaintiff, and that the plaintiff should receive for the loan of said money a greater sum than at the rate of ten dollars on one hundred dollars, for one year, to-wit, at the rate of .... dollars on one hundred dollars for one year.

II. That in pursuance of said agreement the plaintiff delivered to the defendant on said loan, only the sum of ..... dollars; and thereupon the defendant executed and delivered to the plaintiff the promissory note described in the complaint.

III. That by the terms of the statute this defendant is entitled to be relieved from said contract upon payment of the said sum of ..... dollars [*principal sum*], which sum this defendant duly tendered to the plaintiff prior to the commencement of this action, to-wit, on the .... day of ....., 19.., and now brings into court for the use of the plaintiff if he will receive it.

2001. Usury, where interest only is forfeited.

As to the sum of ..... dollars, parcel of said sum of ..... dollars, in said complaint demanded, the said defendant admits that he owes the said sum of ..... dollars to the said plaintiff; but as to the sum of ..... dollars, the residue of the said sum of ..... dollars, the said defendant says the said promissory note in the complaint mentioned, was given by the said defendant to the said plaintiff for the loan of ..... dollars for .... years, and no more and that the said sum of ..... dollars was included in said note, as interest on the said sum of ..... dollars for the said term of .... years, at the rate of .... per cent, per annum.

2002. Want of consideration.

I. The defendant admits that he made the promissory note as stated in the complaint, that the same was indorsed by the payee, and that the plaintiff is the lawful owner and holder thereof, and that no part thereof has been paid.

II. But defendant alleges, on information and belief, that the plaintiff became the purchaser, holder, and owner of said note, on or about the .... day of ....., 19.., and after the same became due.

III. And defendant alleges that said note was made, executed, and delivered by the defendant, in consideration of

the sale and assignment to him of a certain instrument in writing, to-wit [*here describe the instrument or the property and allege its worthlessness. It must be absolutely worthless to sustain the defense*].

2003. Failure of consideration.

I and II. [*As in last preceding form.*]

III. Defendant alleges that said note was made and delivered by the defendant to the plaintiff as the purchase price of a certain horse [*or* certain goods and merchandise] which the plaintiff on the .... day of ....., 19.., sold and delivered to this defendant, and not otherwise.

IV. That in truth and in fact the said plaintiff did not own the said [*describe property*] at the time of such pretended sale and delivery, but the same was then the property of E.... F...., who thereafter and on the .... day of ....., 19.., recovered the same from this defendant by a judgment duly given in his favor in an action of replevin.

V. That defendant has received no consideration for the said note.

2004. That the acceptance was for accommodation.

I. That he accepted the bill mentioned in the complaint for the accommodation of the plaintiff [*or*, of said M.... N....]; and that there was never any value or consideration for the acceptance or payment of said bill by the defendant.

[*Where plaintiff is an indorsee, add:* II. That the same was indorsed to the plaintiff, and he always held the same, without any value or consideration.]

2005. That the note was for accommodaton, and was misapplied.

I. That the note mentioned and described in the complaint was given by this defendant to [*the payee*] therein named, without any other consideration than is hereinafter stated.

II. That theretofore this defendant had loaned his promissory note for ..... dollars, dated on the .... day of ....., 19.., to said [*payee*] without consideration, and sole-

ly for the accommodation of said [*payee*] and upon his promise to take up and pay the same at maturity.

III. That said note fell due on the .... day of ....., 19.., and that at the request of said [*payee*], this defendant then gave him the note in suit, for the special purpose of enabling him therewith to take up and renew said first note of ..... dollars, he paying the balance, and upon the agreement with him that it should be so used, and not otherwise.

IV. That the plaintiff having a claim then over-due against the said [*payee*] the said [*payee*] wrongfully diverted said note from the purpose for which it was given, and fraudulently misapplied the same by giving it to the plaintiff as collateral to secure the payment of said claim.

V. That the plaintiff is not the *bona fide* holder of the note in suit for a valuable consideration; but received the same with notice of the foregoing facts, and as collateral to secure the payment of an antecedent debt, and without paying any consideration therefor.

VI. This defendant denies each and every allegation of the complaint, not hereinbefore admitted.

2006. That the note or acceptance was given for goods sold, but never delivered.

I. That the bill [*or note*] mentioned in the complaint was accepted [*or* given] by the defendant for the price of goods to be sold and delivered by the plaintiff to the defendant before the said bill [*or* note] should become due.

II. That defendant has always been ready and willing to buy and accept said goods from the plaintiff, and has duly performed all the conditions on his part.

III. That the plaintiff has not sold and delivered the same to the defendant [though the defendant, on the .... day of ....., 19.., at ..... duly requested him so to do].

IV. That except as aforesaid there never was any consideration for the acceptance or payment of said bill [*or*, giving or payment of said note] by the defendant.

2007. That the notes were given for purchase-money, and plaintiff failed to convey.

I. That the only consideration of the said three several notes was and is the sale of a certain piece of land, situate in

the county of ..... and state of ....., and known and described as [*description*].

II. That at the time of making said several promissory notes, the said plaintiff agreed to convey the said premises to this defendant, at the time when the sum named in the note described in the first count of the said complaint should become due and payable, to-wit, on the said .... day of ....., 19..; and take a mortgage from this defendant on said premises, to secure the payment of the sums mentioned in the two notes described in the second and third counts of the said complaint.

III. That the defendant duly performed all the conditions of said agreement on his part, and on said day, and ever since has been ready and willing to pay the first-named sum, and execute and deliver said mortgage, on the delivery by the said plaintiff of such deed of conveyance.

IV. That said plaintiff did not, on the said .... day of ....., 19.., nor at any time since, offer to convey the said premises to the said defendant, on the payment of the sum mentioned in the said first note, and the execution of a mortgage by the said defendant as aforesaid, to secure the sums of money mentioned in the two other notes [*or, if by the agreement it was necessary, allege demand and refusal*].

2008. That the note was for goods sold by means of deceit.

I. [*Allege sale as in the case of an action for damages for deceit, Chap. XLV, ante, omitting at the end the allegation of damage and demand for judgment.*]

II. That said note was given to the plaintiff without any other consideration than said [sale].

III. That immediately on discovering said fraud, the defendant rescinded said [*contract*], and delivered [*or* tendered] to the plaintiff all that the defendant had received under said contract, upon condition of his returning said note, which the plaintiff refused to do.

2009. That the note was for goods sold with a false warranty.

I. That the defendant gave the note mentioned in the complaint for and on account of certain goods, called .....,

theretofore furnished by the plaintiff to him, the defendant, under a representation and warranty by the plaintiff, at the time of so furnishing them, made to the defendant, that the said goods were fit and proper material for ..... [*stating the warranty*] and suitable for such purpose; and for no other consideration whatever.

II. That the defendant then accepted and purchased said goods for the purpose of ..... trusting in the said representation and warranty of the plaintiff; all of which the plaintiff then well knew.

III. That the same were not fit or proper for said purpose, but altogether unsuitable and worthless, in this, that [*here state particularly the defects*].

2010. Counter-claim for breach of warranty (adapted from Allen v. Haskins, 5 Duer, 332).

I. The defendant, for a counter-claim herein, alleges that the said note was not, before it became due, transferred and delivered to the plaintiff for value.

II. That the said note was made and delivered by the defendant to one M.... N...., who was at that time an agent or servant of the plaintiff, and acting as such on behalf of the plaintiff in that transaction, in exchange for a quantity of cigars; which was sold by sample to the defendant at that time, by said M.... N...., as such agent.

III. That when said cigars were delivered to this defendant, they did not correspond with the samples, and were not worth more than ..... dollars.

IV. That as soon as the defendant learned the character of said cigars, he offered to said M.... N...., as such agent, to return them, which he is still ready and willing to do.

WHEREFORE the defendant demands judgment for his damages herein, to-wit, the sum of ..... dollars, and that the same be deducted from the amount of the said note.

2011. That the note was given on a purchase of diseased sheep and that they injured other sheep of the defendant (Rose v. Wallace, 11 Ind. 112).

I. The defendant, for a counter-claim, alleges that the said note was given for sheep purchased by the defendant of the plaintiff.

II. That the plaintiff, in making said sale, represented himself to the defendant as a dealer in sheep, and acquainted with their diseases, and that the said sheep were sound and free from disease.

III. That defendant was ignorant of the disease called foot-rot; and that he purchased said sheep, relying upon the said representations of the said plaintiff.

IV. That in fact the sheep were not sound and free from disease, but were diseased with the foot-rot, which is contagious.

V. That the defendant was then the owner of five thousand other sheep, with which he desired those he purchased of plaintiff to run; of all of which the plaintiff had notice at the time of making the said sale.

VI. That before he had any knowledge that the sheep so purchased were diseased, and while they were running with his other sheep, the latter became diseased with said foot-rot from so running together; and that he has been thereby compelled to expend ..... dollars in their cure and endeavoring to cure them, and been damaged by reason of allowing said sheep to run with his other sheep, to the amount of ..... dollars.

WHEREFORE, etc. [*demand of judgment for damages sustained*].

2012. That the note was induced by plaintiff's fraud, general form.

I. That the plaintiff induced him to make the note mentioned in the complaint, by representing that [*here state specifically the false representation of facts*].

II. That the said representation was false, and known to be false by the plaintiff, and made with intent to deceive and defraud this defendant.

III. That the defendant believed said representation to be true, and relied thereon, and so relying did make and deliver to the plaintiff the said note mentioned in the complaint.

[*Allege return of property received, if any, and rescission.*]

2013. Denial of transfer to the plaintiff.

That the said note was made and indorsed by the defend-

ants, and by them delivered to one M.... N.... a person other than the plaintiff, with whom defendants had business transactions; and defendants deny that they have any knowledge or information sufficient to form a belief whether or not said note was thereafter duly transferred and delivered by the lawful, or other, holders thereof to the plaintiff; and the defendants further deny that they have any knowledge or information sufficient to form a belief whether or not the plaintiff is the lawful owner and holder of said note.

2014. Qualified admission of note, and denial of plaintiff's title (Smith v. Mead, 14 Abbott's Pr. 262).

I. Defendants admit that heretofore they executed and delivered a promissory note to the plaintiff; but deny that the description of said note in the complaint is a true description of said note, or correctly states the terms thereof.

II. Defendants, further answering, deny [knowledge or information sufficient to form a belief] that the plaintiff is now, or was at the commencement of this action, the lawful and *bona fide* owner and holder of said promissory note, or has any interest whatever therein; and the defendants allege, on information and belief, that before this action said plaintiff sold and delivered said note for a valuable consideration to one John Doe, who is, and at the commencement of this action was, the lawful owner and holder of said note.

2015. Wrongful transfer by partner (Kerneys v. Richards, 11 Barb. 312).

That the note alleged was not indorsed by M.... N.... & Co., but that it was indorsed in the name of said firm by B...., and by him transferred to the plaintiffs in payment of an individual debt of said B....., and without the knowledge or consent of said A....., his partner, and that the plaintiffs at the time of the said transfer had full knowledge thereof.

2016. Denial of validity of transfer of note by moneyed corporation (Smith v. Hall, 5 Bosw. 319).

I. That said corporation did not indorse said note to the plaintiffs, but the alleged transfer thereof was the act of

some officer, or officers, of said corporation, unauthorized in any manner by the board of trustees.

II. That said transfer was made when the said corporation was insolvent, to the knowledge of the plaintiffs, for a prior indebtedness of the corporation, with intent to give a preference to the plaintiffs over other creditors of the corporation, and that the plaintiff was at the time one of the trustees of the said company.

2017. By accommodation indorsers, alleging extension given to makers.

I. That said note was indorsed by the defendants without consideration, and for the accommodation of the defendant Z....., the maker thereof.

II. That the plaintiffs, at the time they received said note, had notice thereof.

III. That about the time of its maturity, the plaintiffs, for a valuable consideration, and without the knowledge or assent of these defendants, made an agreement with said [*maker*] whereby they agreed to extend the time for the payment of said note by said [*maker*] .... days.

2018. That defendant was a surety, and that plaintiff holds collateral securities to which defendant asks to be subrogated (Bank v. Hunter, 4 Bosw. 646).

I. The defendant, for a counter-claim, alleges that said draft was accepted by the defendant without any consideration, for the accommodation of said [*drawers*], which the plaintiff well knew.

II. That the same was made under an agreement between said [*drawers*] and the plaintiff, whereby said [*drawers*] executed to the plaintiff a bond for ..... dollars, together with a mortgage on house and lot No. ...., ... street, in ....., as security for the payment thereof, which securities the plaintiff still holds, and are ample to secure and satisfy the plaintiff's demand.

III. That said [*drawers*] are insolvent and unable to pay said acceptance, and the defendant has no recourse for the payment or security of the sum for which he is liable to the

plaintiff, except the said mortgages and securities held by the plaintiff.

IV. That the defendant has offered to pay the said draft, with interest and costs, if the plaintiff will surrender and transfer to the defendant upon such payment, the mortgages and securities held by the plaintiff; which the plaintiff refuses to do, but claims to hold said securities for some other demand due to the plaintiff from said [*drawers*].

V. That the plaintiff is a foreign corporation, created and doing business in the state of ....., and the defendant will be remediless under the laws of the state of ....., where the defendant resides, except by the aid and interposition of this court.

WHEREFORE the defendant demands that upon his paying said draft, with interest and costs, the plaintiff be adjudged to transfer said bond and mortgage to the defendant [and that he may hold and enforce them for his reimbursement, with interest].

2019. Denial of acceptance, presentment, and protest.

The defendant denies that the bill of exchange mentioned in plaintiff's first cause of action was presented for acceptance, or was accepted as alleged, or was presented for payment, or was protested for non-payment, or that payment was refused, as alleged in said complaint.

2020. Denial of notice.

The defendant denies that notice of the dishonor of the said promissory note [*or* bill] was given to the defendant, as alleged in the complaint herein.

2021. Denial of presentment.

The defendant denies that the promissory note [*or* bill of exchange] mentioned therein, was ever presented for payment [*or* for acceptance] to him [*or* to M.... N....] as alleged in said complaint.

2022. Denial of excuse for non-presentment.

The defendant denies that due search was made when the said bill of exchange [*or* promissory note] became due and payable, to discover the residence and person of the said

E.... F...., at ..... or elsewhere, in order that the said bill might be presented to the said E.... F.... for payment, as alleged in said complaint.

2023. Breach of special agreement as to presenting and giving notice.

I. That the bill of exchange [*or* check] in the said complaint mentioned, was by the said defendant delivered to the said plaintiff, and by him discounted for the said defendants, upon the express condition and understanding that the plaintiffs should cause the same to be presented to the respective drawees thereof for acceptance or payment, and acceptance or payment thereof to be demanded as soon after the delivery thereof as the same could be done by the exercise of reasonable diligence in that behalf; and that in case of the non-acceptance or nonpayment thereof by the respective drawees, on presentation or demand, immediate notice of such non-acceptance or non-payment should be given to the defendants by telegraph, or that the said defendants should not be bound or liable to pay the said bill of exchange.

II. That the said plaintiff failed to comply with the condition or understanding aforesaid, and did not present the said bill of exchange for acceptance or payment or demand acceptance or payment of the same within a reasonable time after the delivery thereof to the said plaintiff; nor was immediate notice of the non-acceptance or non-payment thereof given to the defendants, by telegraph or otherwise.

2024. Payment of bill, to drawer, before indorsement.

I. That after the bill mentioned in the complaint was due, and while said [*drawer*] was the holder thereof, and before this action, the defendant satisfied and discharged the principal and interest [and damages] due on said bill, by payment to the said [*drawer*].

II. That said [*drawer*] first indorsed said bill to the plaintiff after said payment.

2025. Fraudulent representations as to the character of the instrument (adapted from Walker v. Ebert, 29 Wis. 194).

I. That this defendant is a German, unable to read or write the English language, and that on the day of the date of supposed note in the complaint described, and just before the supposed making thereof the said E.... F.... and G... H...., the payees named therein falsely and fraudulently represented to defendant with intent to swindle, cheat and defraud the defendant, that they would appoint him an agent for the town of ..... for the exclusive sale of a certain patent and invention known as the Sulky Wheel Cultivator [*here set forth the representations and agreements orally made*]; that thereupon the said E.... F.... and G.... H.... presented to this defendant to sign in duplicate, an instrument partly written and partly printed, which this defendant was unable to read, and which the said E.... F.... and G.... H.... falsely and fraudulently then and there represented to be simply a contract of agency embracing the terms and conditions orally agreed on as aforesaid.

II. That thereupon this defendant, relying upon the truth of said representations, and believing that said instrument was simply an agency contract in duplicate, and being unable to read the same, and without negligence on his part, attached his signature to the said instrument in duplicate, and that the said E.... F.... and G.... H.... immediately took the same, and this defendant has not since that time seen the said instrument.

III. Upon information and belief the defendant alleges that in truth and in fact the said instrument so signed by defendant was in form a promissory note, and not an agency contract, and that the same is the identical note upon which this action is brought.

IV. That this defendant never intended to sign or deliver the said note, and never received any consideration of any kind therefor, but that the same, if signed by this defendant at all, was signed under the circumstances hereinbefore set forth, and not otherwise.

V. [*If plaintiff is an indorsee.*] That the plaintiff gave no valuable consideration for said note, but that the same

was assigned to him after maturity thereof, and with knowledge of the facts hereinbefore stated.

2026. That note was given to compound a felony.

I. The defendant alleges that on or about the .... day of ....., 19.., this defendant [*or* one E.... F...., the son of this defendant] feloniously [*here state crime committed*], and that thereafter it was agreed by and between this defendant and the said plaintiff that the defendant should execute and deliver to the said plaintiff his promissory note for the sum of ..... dollars in settlement and satisfaction of the said crime, and for the purpose of compounding the same, and that in pursuance of said agreement the said note described in the complaint was executed and delivered to the plaintiff, and upon no other or different consideration.

CHAPTER XCV.

DEFENSES IN ACTIONS ON AWARDS.

2027. Denial of parol submission.
2028. Denial of award.
2029. Performance by defendant.
2030. Denial of performance by plaintiff.
2031. Invalidity of award.

2027. Denial of parol submission.

I. The defendant denies that he ever agreed with the plaintiff that any matters of dispute or difference between himself and the plaintiff should be submitted to arbitration, as alleged in said complaint.

2028. Denial of award.

I. The defendant denies that the said [*arbitrators or umpire*] at any time made or published any award as in said complaint alleged.

2029. Performance by defendant.

I. The defendant denies that he has failed or neglected to perform said award, and on the contrary thereof alleges that on the .... day of ....., 19.. [*here state what defendant has done by way of performance of the award*].

2030. Denial of performance by plaintiff.

I. The defendant denies that the plaintiff has performed said award, and alleges that the plaintiff did not [*here state breaches of award by the plaintiff*].

2031. Invalidity of award (Knowlton v. Mickles, 29 Barb. 465).

I. The defendant admits the submission of the said controversy to arbitration, and that the time for the delivery of the award was extended, as stated in the complaint.

II. The defendant denies [any knowledge or information sufficient to form a belief] that the arbitrators made an award

[in writing, under their hands, and delivered the same to the plaintiff] within the time so limited therefor.

III. The defendant further says, that he never had any notice of the time or place when or where the said arbitrators would meet to hear the matters submitted to them, or any opportunity of appearing before said arbitrators, nor of producing proof, nor examining witnesses, nor of being heard in his defense before said arbitrators; and the alleged award was made without any information or notice thereof to the defendant, until long after the day when the same is alleged to have been made.

IV. That the said arbitrators, on the .... day of ....., 19.., and while examining the premises and preparing their award, or immediately prior thereto, and on the same day, examined several witnesses touching the matters submitted to them by the parties, and took and heard their statements in respect thereto, in the presence of the plaintiff, and in the absence of, and unbeknown to, and without the consent of, the defendant.

V. That defendant had a good and substantial defense upon the merits, in the matter submitted to said arbitrators; and that he would have been entitled to an award in his favor, had an opportunity been afforded him of producing his proofs before the said arbitrators.

CHAPTER XCVI.

DEFENSES IN ACTIONS ON BONDS.

2032. That the bond sued on was on a condition, and that defendant has paid it.
2033. Failure of consideration.
2034. Failure of consideration in action on bond for purchase money.

2032. That the bond sued on was on was on a condition, and that defendant has paid it.

I. That the bond mentioned in the complaint was, and is subject to a condition thereunder written to make void the same, upon payment by the defendant to the plaintiff, on the ....day of ....., 19.., of the sum of ..... dollars, with interest at the rate of .... per cent. [*or other condition*].

II. That the defendant on that day [*or* after that day, and before the commencement of this action] paid to the plaintiff the said sum of ..... dollars, with all interest due thereon, and thereby fully performed and discharged the said condition.

2033. Failure of consideration.

I. That he gave said bond [with a mortgage collateral thereto] to said [*obligee*] solely in consideration of the performance by said [*obligee*] of the covenants and conditions upon his part, in an agreement then made between them, of which agreement a copy is annexed as a part of this answer.

II. That this defendant duly performed all the conditions thereof on his part.

III. That the said [*obligee,—here allege breach, as in an action upon the contract*].

2034. Failure of consideration in action on bond for purchase money.

I, II, III and IV. [*Allege conveyance by the plaintiff to the defendant, with covenant, and breach thereof, in a similar manner as in a complaint in an action for breach of covenant, ante Chapter XXXIX.*]

V. That at the same time when the said conveyance was executed by the plaintiff [and his said wife] to-wit, on the said .... day of ....., 19.., at ..... the defendant, simultaneously with the execution of the said conveyance, executed and delivered to the plaintiff the bond mentioned in the complaint, as a security for the payment of the purchase money in the said conveyance mentioned, and for no other purpose or intent whatever; and the same, respectively, were so then and there accepted and received by the said plaintiff from the said defendant as such security as aforesaid.

CHAPTER XCVII.

DEFENCES IN ACTIONS ON GUARANTIES.

2035. Denial of performance by plaintiff.
2036. Departure from guaranty.
2037. Denial of notice of acceptance.
2038. Alteration of contract releasing guarantor.

2035. Denial of performance by plaintiff.

I. The defendant denies that the plaintiff at any time sold or delivered the goods [*or* rendered the services] to the said E.... F...., as alleged in said complaint.

2036. Departure from guaranty.

I. The defendant denies that he at any time agreed or promised to be answerable generally to the plaintiff for the price of all goods sold by him to the said E.... F...., and on the contrary alleges that he agreed to be answerable only for goods to an amount not exceeding ..... dollars [*or*, to be sold on a credit not exceeding .... months], which limit the plaintiff exceeded in his alleged sale.

2037. Denial of notice of acceptance.

I. The defendant denies that any notice was at any time given to the defendant by the plaintiff or by any person in his behalf that the plaintiff accepted the said guaranty set forth in the complaint and would give to said E.... F...., the credit therein mentioned or that plaintiff had furnished said goods [*or*, rendered said services] in reliance upon said guaranty.

2038. Alteration of contract releasing guarantor.

I. That on the ..... day of ..... 19.. the plaintiff without the knowledge or consent of the said defendant agreed with the said [*name the principal*] in consideration of the sum of ..... dollars, to [*here state the change made in the contract as for instance*] to extend the time of payment of the rent guaranteed by the defendant for the period of ..... days from ..... 19.....

CHAPTER XCVIII.

DEFENSES IN ACTIONS ON INSURANCE POLICIES.

2039. Denial of policy.
2040. Denial of plaintiff's interest.
2041. Denial of loss from risk insured against.
2042. That the policy was obtained by misrepresentations.
2043. The same, in life insurance.
2044. Denial of making of proof of loss.
2045. Denial of certificate of notary.
2046. That plaintiff gave a fraudulent account of loss.
2047. Transfer, without insurer's consent.
2048. Existence of liens.
2049. Extra-hazardous risk.
2050. Another form. Correcting plaintiff's statement of the policy, and alleging extra-hazardous use of the premises.
2051. Unseaworthiness of vessel.
2052. Sale of damaged goods by plaintiff, and that defendants paid deficiency.
2053. Other insurance, without consent.
2054. Action not commenced within time limited by policy.
2055. Cancellation of policy before loss.
2056. That death occurred while insured was violating law.
2057. That insured violated policy by traveling beyond territory limited.
2058. That material statements in application were false.
2059. Answer that building was unoccupied.
2060. Voluntary assignment or mortgage by assured.
2061. Outline of answer by fraternal benefit order, alleging failure to conform to constitution or by-laws.

2039. Denial of policy.

The defendant denies that on the .... day of ....., 19.., or at any other time it executed or delivered the policy of insurance described in the plaintiff's complaint.

2040. Denial of plaintiff's interest.

I. The defendant denies that the plaintiff owned or had any insurable interest in the said goods [*or* the said building, or its contents] at the time of the happening of the said loss in the complaint described.

2041. Denial of loss from risk insured against.

I. The defendant denies that the said building was de-

stroyed [*or* injured] during the term of said insurance by [*here state risks or perils insured against*], but on the contrary, the defendant alleges that said loss occurred wholly by [*here state the excepted peril which caused the loss*].

2042. That the policy was obtained by misrepresentations.[1]

That the defendants were induced to make and deliver the policy, and become insurers, as alleged in the said complaint, by the misrepresentation made by the plaintiff to the defendants of a fact then material to be known to the defendants, and material to the risk of the said policy; that is to say, by the misrepresentation that the said vessel was loaded with hides, whereas a large portion of her cargo consisted of guano [*or*, that the said vessel had sailed from ..... on the .... day of ....., 19.., where she had not sailed from ..... on that day, but on the .... day of ....., 19..], as the plaintiff well knew.

2043. The same, in life insurance (see note to preceding form).

That a material fact stated in the application mentioned in the policy which is alleged in the said complaint, and which was thereby agreed to be the basis of the said insurance, was untrue; that is to say [*or, where the representation was not incorporated in the contract:* That the said M.... N.... induced the defendants to subscribe the policy and become insurers as alleged, by falsely and fraudulently representing to them], that at the time of the delivery of said declaration to the defendants said M.... N.... was in a good state of health, and was not afflicted with any disease or disorder tending to shorten life; whereas, he was not then in good health, but was afflicted with ....., a disease which does tend to shorten life.

2044. Denial of making of proof of loss.

The defendant denies that the said plaintiff did, within .... days, which was the time limited in the conditions an-

[1] The defense of fraudulent representations or warranties must be affirmatively pleaded; the exact misrepresentations relied on must be set forth, and the proof will be limited to the misrepresentations alleged.

nexed to the said policy, nor within a resonable time after the said loss, make out or deliver a particular account of such loss and damage, signed by or on behalf of the plaintiff, and verified by his oath or affirmation; but neglected to do so for the space of .... months after said loss.

2045. Denial of certificate of notary.

That the plaintiff did not, within .... days, which was the time limited in the conditions annexed to the policy, nor within a reasonable time after said loss procure [nor has he at any time since procured, nor delivered to the defendants], the certificate, under the hand of a magistrate or notary public, which is by the conditions annexed to the said policy, required of the said plaintiff.

2046. That plaintiff gave a fraudulent account of loss.

That after the alleged loss and damage, and before action, the plaintiff made and delivered to the defendants a false and fraudulent account of the alleged loss and damage, as and for such account as is mentioned in the conditions contained in [*or* annexed to] said policy, in which said account he represented and stated that insured goods and property of the plaintiff to the amount of ..... dollars had been burnt and destroyed by the said fire, and that his loss and damage by the said fire were to the said amount of ..... dollars, with intent to induce the defendants to pay to him said amount; whereas insured goods and property of the plaintiff had not been burnt or destroyed by said fire to that amount, and his said loss and damage do not exceed ..... dollars, as the plaintiff then well knew.

2047. Transfer, without insurer's consent.

I. That it is, among other things, provided by said insurance policy, that in case of any transfer or termination of the interest of the insured, either by sale or otherwise of the property insured, without the consent of the company, the policy should from thenceforth be void.

II. That after the making of said policy, and before the loss alleged, the interest of the said [*insured*] in said [*things insured*] was terminated and transferred, and the title thereto vested in said plaintiff without the consent of the defend-

ants, whereby the policy became, and was, void at the time of said loss.

2048. Existence of liens.

I. [*Allege provisions of policy, similarly as in preceding form.*]

II. That at the time of making said policy, the said interest of [*the insured*] was not free from all liens and claims that might be prosecuted against the said [*thing insured*]; but on the contrary, the same was subject to a chattel mortgage, which was unknown to the defendants at the time of issuing said policy, which mortgage was dated on the .... day of ....., 19.., and given by said plaintiff to one M.... N.... to secure ..... dollars.

2049. Extra-hazardous risk.[2]

I. [*Allege provisions of policy, similarly as in preceding form.*]

II. That after the making of the said policy, and before the loss alleged, the plaintiff received into his said store a large quantity of goods known and described as extra-hazardous, to-wit, ... well knowing that such reception was a violation of the conditions in the said policy contained; and at the time of the said fire, the said plaintiff had in said store a large quantity of such extra-hazardous goods.

2050. Another form. Correcting plaintiff's statement of the policy, and alleging extra-hazardous use of the premises.

I. The defendants admit that they are a corporation duly created by and under the laws of this state, and that they did, on or about the .... day of ....., 19.., at ....., in consideration of ..... dollars, to them paid, execute and deliver to M.... N...., in the complaint named, a policy of insurance, whereby they insured the said M.... N.... to the amount of ..... dollars against loss or damage by fire upon [his stock of books and stationery contained in the five-story brick building, No. ...., in ..... street] subject,

[2] This is an affirmative defense, and must be specially pleaded by defendant.

nevertheless, and upon the terms, conditions, limitations, and restrictions in the said policy, and hereafter particularly referred to, and not otherwise; but the defendants deny that they insured the said M.... N.... in the way and manner, and to the extent and with the privileges, in the complaint alleged; and they also deny that the paper annexed to the complaint, and purporting to be a copy of the said policy, is a correct copy of the policy so issued by the defendants and delivered to the said M.... N.... as above admitted, and which was the only policy ever issued to him by these defendants.

II. And these defendants further allege that it was in and by the policy so executed and delivered as aforesaid amongst other things, agreed and declared on the part of both parties that [*setting forth provisions relied on*].

III. And further, "and that this policy is made and accepted in reference to the proposals or conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for."

IV. And these defendants further allege that at the time of the execution and delivery of the said policy, there was annexed thereto a printed paper containing "proposals for insuring" and "conditions of insurance," together with "classes of hazards," embracing therein articles designated "Hazardous," "Extra-hazardous," and "Memorandum of special rates," which proposals and conditions became and were part of the contract, and by which it was agreed and declared that [*setting forth the conditions relied on*].

V. These defendants deny that the said M.... N.... fulfilled or performed the terms and conditions imposed upon and assumed by him in and by the said policy, and the proposals and conditions aforesaid; but on the contrary, the defendants, upon information and belief, aver that they, the said M.... N.... did violate the same.

VI. They further allege that after the delivery of the said policy, and before the loss in the complaint alleged, and on or about the .... day of ....., 19.., the said M.... N...., without the knowledge, approbation, or consent of the defendants, and against their will, used the .... story of the building in the said policy mentioned, or suffered the same to be used, as and for a [bookbindery] and continued to make, or

suffered such use, from thence until and at the time of the fire in the complaint mentioned.

VII. And these defendants further allege that they never knew or had notice that the said building was so improperly used and occupied until after the said fire; that they never in any way authorized or acquiesced in such use thereof; that they never charged or received any premium for such additional risk.

VIII. They further allege that by reason of such wrongful and improper use of the said .... story, the risk assumed by the defendants in and by the said policy became and was increased and rendered more hazardous than it was at the time the said policy was issued; by reason whereof the said policy became void, and at the time of the alleged fire, which they admit occurred, they were not insurers of the said M.... N.... for any sum.

IX. These defendants, further answering, deny each and every allegation in said complaint contained not hereinbefore specifically admitted.

2051. Unseaworthiness of vessel.

I. [*Allege provisions of policy, as in Form 2047, unless it appears by the complaint.*]

II. That at ....., and in the course of said voyage, and in reference to the said voyage, and to any damage which the said ship sustained in the prosecution thereof, a regular survey was had on the .... day of ....., 19.., upon which survey was had on the .... day of ....., 19.., upon which survey the said ship was thereby declared unseaworthy, by reason of her being rotten [*or state particulars, showing a ground of her condemnation wholly within the provisions of the policy*].

2052. Sale of damaged goods by plaintiff, and that defendants paid deficiency.

I. That the invoice value of the said [*insured goods*] amounted to ..... dollars, and that the said last-mentioned amount was the sum insured thereon under the policy mentioned in the complaint, and that the net market-value of the said [*insured goods*], if the same had not been damaged,

was estimated by S.... C.... & Co., by whom the said insurance was effected, at the sum of ..... dollars.

II. That the said [*insured goods*] were sold by auction in the city of ....., on or about the .... day of ....., 19.., by order of the said S.... C.... & Co.

III. That the proceeds of such sale amounted to ..... dollars; thereby showing a loss of .... per cent. on the above estimated net market-value of the said goods, if the same had not been damaged. That the same percentage on the sum insured on the said goods amounted to ..... dollars; and that the defendants, on or about the .... day of ....., 19.., paid the said last-mentioned sum, together with the expenses of the said sale by auction, to the said S.... C.... & Co., and that the said S.... C.... & Co., accepted and received such payment as an adjustment and settlement of the damage or injury to the said goods.

2053. Other insurance, without consent.

I. The defendant alleges that the said insurance policy provides [*here set forth terms of condition in policy prohibiting other insurance, if the same be not set forth by the plaintiff in his complaint*].

II. That at the time of the issuance of the said policy the said property had been previously and then was insured in another company, to-wit, the A.... X.... company, in the sum of ..... dollars, of which previous insurance this defendant had no knowledge, nor did this defendant consent thereto, nor indorse such consent upon the policy described in the complaint in this action. [*If the additional insurance was effected after the issuance of the policy in suit, vary the foregoing allegation accordingly.*]

2054. Action not commenced within time limited by policy.

I. The defendant alleges that the said insurance policy provides [*here set forth terms of provisions requiring action to be brought on the policy within a limited time*].

II. That the said fire [*or* loss] occurred on the .... day of ....., 19.., and that this action was commenced by the service of summons on the .... day of ....., 19.., which

was more than .... days after the occurrence of the said fire [*or* loss], whereby this action has become wholly barred by the terms of the said policy.

2055. Cancellation of policy before loss.

I. The defendant alleges that the said policy of insurance contained the following provision [*here set forth provision allowing cancellation, if it be not set forth in plaintiff's complaint*].

II. That on the .... day of ....., 19.., this defendant made and served upon the plaintiff a notice of its election to cancel said policy, of which notice the following is a copy [*copy of notice*].

III. That at the time of the service of said notice of cancellation the defendant tendered to the plaintiff the sum of ..... dollars, being the amount of unearned premium upon said policy upon cancellation thereof, but that plaintiff refused and still refuses to accept said unearned premium, or to surrender said policy, although the defendant has ever since been and is now ready and willing to pay to the plaintiff said unearned premium, and now brings the same into court with this answer for the benefit of the plaintiff, if he will accept the same.

2056. That death occurred while insured was violating law.

I. The defendant alleges that said policy contains the following provision [*here insert provision containing the agreement relieving the company from liability if death occurs while the insured is violating law, if the provision is not already set forth in the complaint*].

II. The defendant further alleges that the said insured died while engaged in violating the laws of the state of ..... and in consequence thereof, to-wit, said death occurred while deceased was [*here state crime or offense in which deceased was engaged, with particularity and certainty*].

2057. That insured violated policy by traveling beyond territory limited.

I. That the said policy of insurance described in the complaint herein contained a provision to the effect that the same

should be void if the said assured should without written consent of this defendant go beyond [*here state limits fixed by policy*].

II. [*Upon information and belief*] that on or about the .... day of ....., 19.., and while said policy was in full force, the said assured, without the consent of this defendant, went [*here state where*], whereby, as this defendant claims and insists, said policy became and is wholly void.

2058. That material statements in application were false.

I. That the said policy of insurance mentioned in the complaint was founded upon and issued in consideration of the statements made by the said E.... F.... in his written application for insurance, which said application was made by said assured and presented to this company on or about the .... day of ....., 19..

II. That said application so made contained the following question, viz. [*state question*], and that the said assured answered the said question in writing and made his said answer a part of said application, as follows [*state answer*].

III. That the said answer so made in said application was willfully false when made, and known so to be by the said assured: that the said assured was not at that time [*here negative the false statement*], but on the contrary, was [*here state the real fact*].

IV. That the said statement so made by said assured was material to the risk, and was relied upon and believed by this defendant, and that the said policy was thereafter issued by reason of said statement, and in reliance thereon, and not otherwise.

2059. Answer that building was unoccupied.

I. That said policy contained the following provision [*insert provision prohibiting vacancy without consent*].

II. That the building described in said policy became vacant and unoccupied on or about the .... day of ....., 19.., and so remained vacant and unoccupied up to the time of the said fire, and that this defendant at no time consented

that such building might remain vacant or unoccupied, nor was such consent ever indorsed upon said policy, whereby said policy became wholly void.

2060. Voluntary assignment or mortgage by assured.

I. That the said policy of insurance contained the following provision [*insert provision prohibiting the change of title of property or mortgage*].

II. That on or about the .... day of ....., 19.., the said assured duly made and executed and delivered a voluntary assignment for the benefit of his creditors to one L.... M...., which assignment conformed in all respects to the requirements of the statutes of the state of .... and was fully perfected by the execution and filing in the proper office of all bonds, schedules, inventories and other papers required by law to be executed or filed in order to consitute a complete voluntary assignment under the laws of said state.

[II. *If it be claimed that policy is avoided by mortgage:* That on or about the .... day of ....., 19.., the said plaintiff executed and delivered to one O.... P.... a mortgage upon said property for the sum of ..... dollars, without the knowledge of the defendant and without any consent on the part of this defendant, either indorsed upon said policy, or otherwise, whereby said policy has become wholly void.]

2061. Outline of answer by fraternal benefit order, alleging failure to conform to constitution or by-laws.

I. That the said assured made a written application for membership in the defendant order on or about the .... day of ....., 19.., and that the said benefit certificate mentioned in the complaint was issued in reliance upon said application, and the statements and agreements therein contained; that among the said statements and agreements was an agreement that the said assured should be governed by all the provisions of the consitution and by-laws of said order then existing, or which might thereafter be adopted, and that failure to conform to such provisions or any of them should avoid the said certificate.

II. That the constitution of said order then contained and still contains the following provision [*insert provision claimed to have been violated*].

III. That on or about the .... day of ....., 19.., the said assured [*here state violation of the provision with particularity*], and that by reason thereof the said certificate became and is void and of no effect.

CHAPTER XCIX.

DEFENSES IN ACTIONS ON LEASES.

2062. Denial of hiring.
2063. Denial of execution of lease.
2064. Denial by assignee.
2065. Assignee's assignment to third person.
2066. Tender of rent upon the land.
2067. Eviction.
2068. The same; as a defense to one instalment.
2069. Surrender of the premises.
2070. That the landlord accepted an assignee as his tenant.
2071. By a surety, alleging extension of time.
2072. By surety, showing neglect to collect from the principal, or give notice of nonpayment.
2073. Destruction or serious injury to premises, and surrender thereof.
2074. Dilapidation by which premises are made unfit for occupation.

2062. Denial of hiring.

The defendant denies that he at any time hired of the plaintiff the premises described in the complaint as therein alleged.

2063. Denial of execution of lease.

The defendant denies that the plaintiff at any time executed or delivered to the defendant or that the defendant at any time executed or received from the plaintiff any lease of the premises described in said complaint, as therein alleged.

2064. Denial by assignee.

The defendant denies that any assignment of the lease described in the complaint was at any time made to or accepted by the defendant, and further denies that the defendant at any time occupied the said premises under the said lease.

2065. Assignee's assignment to third person.

That before the rent claimed in the complaint became due, and on or about the .... day of ....., 19.., this defendant assigned and transferred all his interest in said lease to one E.... F.... who then entered into possession of said premises and so continued when said rent became due.

2066. Tender of rent upon the land.

I. That he was present at the said demised dwelling-house at the time when the said ..... dollars became due as aforesaid, to-wit, on the .... day of ....., 19.., for a reasonable time, to-wit, the space of one hour, before sunset, and there continued until a reasonable time, to-wit, one hour after sunset on the same day, and during all the interval of time aforesaid was there, ready to pay the said ..... dollars to the plaintiff.

II. That neither the said plaintiff, nor any other person on his behalf, during any part of said time, was there ready to receive the same.

III. That since the said day the defendant has always been, and still is, ready to pay the said ..... dollars to the plaintiff; and he now brings the said ..... dollars here into court, ready to be paid to the said plaintiff, if he will accept the same.

2067. Eviction.[1]

I. That after the making of the lease [*or*, after the letting] mentioned in the complaint, and before any part of the rent in the complaint demanded * became payable, the plaintiff forcibly entered upon the premises, and removed the defendant therefrom [*or*, from a part thereof, to-wit, *describing the part*], and kept him out of possession from thence until the .... day of ....., 19.. [*or*, until after said rent became due].

2068. The same; as a defense to one instalment.

The defendant alleges that as to the last instalment mentioned in the complaint, after the alleged lease was made [*or*, after the alleged letting] and before said instalment [*continue as in preceding form from the* *].

[1] For various forms of allegation of eviction see forms of complaints for breach of covenants in Chapter XXXIX, *ante*. Prior to the code constructive eviction by annoyances committed by the landlord might be shown under this plea, (Dyett v. Pendleton, 8 Cowen, 727); but probably under the code, the facts should be stated. The eviction must be alleged to have taken place before the rent fell due. McCarthy v. Hudson, 24 Wend. 291; Vernam v. Smith, 75 N. Y. 327.

2069. Surrender of the premises.

The defendant alleges that before the rent claimed in the complaint became due [*or*, before the alleged breaches set forth in the complaint herein] the defendant surrendered to the plaintiff the demised premises, and all the residue of the said term then to come, and unexpired therein; and the plaintiff then accepted such surrender, and took possession of the said premises.

2070. That the landlord accepted an assignee as his tenant.

I. The defendant alleges that before the rent [*or*, the last instalment of rent] claimed in the complaint became due [*or*, before the breaches alleged in said complaint] the defendant duly assigned [by deed] all his estate and term of years then to come and unexpired in the demised premises to M.... N...., who then entered into the same, and was possessed thereof for the residue of said term.

II. That the plaintiff then had notice thereof, and afterwards accepted from the said M.... N.... rent under the lease [*or*, agreement] mentioned in the complaint, and accepted the said M.... N.... as his tenant of said premises.

2071. By a surety, alleging extension of time.[2]

I. The defendant alleges that on the .... day of ....., 19.., at ..... [*or* at some time and place unknown to the defendant], the plaintiff agreed with said [*debtor*], in consideration of ..... dollars [*or*, for a valuable consideration], to forbear and extend the time of payment of the said rent guaranteed by the defendant .... days [*or*, from the .... day of ....., 19.., on which the same was due, until the .... day of ....., 19..]

II. That the defendant had no knowledge of [*or* did not assent to] the said agreement to extend the time.

2072. By surety, showing neglect to collect from the principal, or give notice of non-payment.

I. The defendant alleges that the plaintiff never gave this

[2] This is an affirmative defense, and must be specially pleaded in order to admit evidence of the fact.

defendant any notice of the alleged non-payment of said rent by said [*debtor*] until more than .... months after the termination of the lease, and has never made any demand on this defendant for payment of said rent, except by the commencement of this action.

II. That at the time alleged in the complaint as the time when the said supposed debt became due the said [*debtor*] was solvent, and able to pay the same, and it might have been collected from him if the plaintiff had used due and diligent effort; but he unreasonably and improperly neglected so to do.

III. That since that time, and before said .... months thereafter had elapsed, the said [*debtor*] became, and now is, wholly insolvent and unable to pay the said debt; and has failed to make payment thereof, if at all, through the unreasonable neglect of the plaintiff to proceed in the collection of the same from him, or to give this defendant due notice of his default.

2073. Destruction or serious injury to premises, and surrender thereof.[3]

I. The defendant alleges that on or about the .... day of ....., 19.., without fault or neglect on his part, the said dwelling-house [*or other building*] was totally destroyed by fire [*or*, was partially destroyed by fire, *or otherwise state the injury according to the facts*], so that the same became and was untenantable and unfit for occupancy, and that on account of such destruction [*or* injury] and on the .... day of ....., 19.., this defendant, by reason thereof, quit and surrendered possession of the said building and premises [and the plaintiff thereupon accepted such surrender and went into possession thereof, and has since retained such possession].

2074. Dilapidaton by which premises are made unfit for occupation.[4]

I. The defendant alleges that on or about the .... day of ....., 19.., without negligence on the part of the de-

[3] This is not a defense unless made so by statute, or by the provisions of the lease. This form is drawn to meet the terms of Wis. Stats. 1913 sec. 2196*a*; Ariz. R. S. 1913 sec. 4713; Minn. Gen. Stats. 1913 sec. 6819.

[4] This form is intended to meet

fendant, said dwelling-house became dilapidated and out of repair in this [*here state nature of dilapidations, and cause thereof*], so that said building, by reason of said dilapidations, became and remained unfit for the accommodation of human beings.

II. That thereafter, and on or about the .... day of ....., 19.., this defendant duly notified the plaintiff [in writing, *if notification was written*] of the fact of such dilapidation and requested the plaintiff to repair the same, but that the said plaintiff refused and neglected to make such repairs, and that the defendant thereafter, and on the .... day of ....., 19.., vacated the said premises and has never since that time occupied the same, whereby the defendant alleges that he has been and is discharged from any obligation to pay the rent claimed in the complaint.

the requirements of Cal. C. C. 1906 sec. 1941, 1932; Mont. Rev. Codes 1907 sec. 5226, 5227; N. Dak. Rev. Codes 1905 sec. 5527, 5528; S. Dak. C. C. 1908 sec. 1433, 1434; Okla. Comp. Laws 1909 sec. 1170, 1171. See note to next preceding form,

CHAPTER C.

DEFENSES IN ACTIONS ON JUDGMENTS.

2075. Denial of judgment.
2076. Invalidity of judgment because of failure to obtain jurisdiction of the person.
2077. Failure to obtain jurisdictjon of non-resident defendant.
2078. Payment of judgment.
2079. Subsequent vacation of judgment.
2080. Fraud in the recovery of the judgment.

2075. Denial of judgment.[1]

I. The defendant denies that the pretended judgment set forth in the complaint was ever rendered in the ..... court as in said complaint alleged, and further denies that the said pretended judgment was ever docketed in the office of the clerk of said court, as in said complaint alleged.

2076. Invalidity of judgment because of failure to obtain jurisdiction of the person.

I. The defendant alleges that no summons [*or otherwise properly name the original process according to the statute of the particular state*] was at any time served upon him in the action described in the complaint herein, and the defendant further alleges that he never appeared in person or by attorney in the said action.

2077. Failure to obtain jurisdiction of non-resident defendant.

I. The defendant alleges that the action in which the supposed judgment against him was alleged to have been recovered arose upon an alleged contract [*or otherwise state the nature of the action*].

[1] If the defense consists of an attempt to impeach the validity of a judgment regular in form on the ground of fraud or lack of jurisdiction by facts outside of the record, some one of the following forms should be used. This form simply denies the existence of a record judgment.

II. That when the action was commenced this defendant was a non-resident of the state of ..... and a resident of the state of .....

III. That he never appeared in that action, and never was personally served in the state of ..... with summons [*or otherwise properly name the original process*] therein.

IV. That when the said supposed judgment was rendered the said court had acquired no jurisdiction of the person of the defendant for the following reasons [*here state particularly the defect or defects in the proceedings for publication of the summons, or the failure to make publication or mailing, by reason of which no jurisdiction was acquired*].

2078. Payment of judgment.

The defendant alleges that on the .... day of ....., 19.., and before the commencement of this action, this defendant paid to the plaintiff ..... dollars, in full settlement and discharge of said judgment, and of the alleged cause of action upon which the same was founded.

2079. Subsequent vacation of judgment.

That on or about the .... day of ....., 19.., upon motion duly made, the said ..... court duly made and entered an order setting aside and vacating the said judgment described in the complaint.

2080. Fraud in the recovery of the judgment.[2]

I. The defendant alleges, by way of counter-claim, that after the commencement of the action mentioned in the complaint, the said plaintiff came to this defendant and, with intent to deceive him, and prevent him from defending it, falsely and fraudulently represented [*here state representa-*

[2] In Wisconsin relief against a judgment obtained against a party through his mistake, inadvertance, surprise, or excusable neglect must be obtained by motion within one year after notice. Wis. Stats. 1913 sec. 2832. However, if fraud or collusion be charged, an action in equity may be maintained, not for the purpose of vacating the judgment, but for the purpose of preventing its inequitable enforcement. If such an action may be maintained, it would seem to follow that the same relief may be obtained by equitable counter-claim, hence this defense is pleaded as a counter-claim. Crowns v. Forest Land Co., 102 Wis. 97; 78 N. W. 433.

tions, e. g., thus]: that he, said plaintiff, intended to and would dismiss said action, and that this defendant need not appear therein. [*The false representations or other fraud relied on must be fully set forth.*]

II. That, relying on said representations, this defendant omitted to appear therein, as he otherwise would have done.

III. That the plaintiff, thereafter, and without the knowledge of, or notice to, this defendant, proceeded to judgment therein, with intent to defraud him.

IV. That the defendant had no knowledge of the existence of said judgment until the .... day of ....., 19..

V. That the defendant was not indebted to the plaintiff in the sum claimed in the complaint in said action, nor in any sum whatever, but had and still has a complete and perfect defense to said action, to-wit [*the defense should be fully stated as in a pleading*].

WHEREFORE the defendant demands that said judgment be set aside and vacated, that the plaintiff be perpetually enjoined from in any manner collecting or enforcing the same, and for such other relief as may be equitable, with his costs.

In Minnesota, under Minn. Gen. Stats. 1913 sec. 7910, an action in equity to set aside a judgment for fraud may be brought within three years after discovery of the fraud, but the complaint must show that the action was brought within the statutory time, and that the defendant was free from contributory negligence. Schweinfurter v. Schmal, 69 Minn. 418; 72 N. W. 702. Doubtless the same relief could be obtained by equitable counter-claim in an action to enforce the judgment, but the allegations should be sufficient to sustain the counter-claim as a compliant. Value v. Miller, 69 Minn. 440; 72 N. W. 453. The facts showing the defendant's freedom from negligence must clearly and affirmatively appear. Schweinfurter v. Schmal, *supra*.

In the other states covered by this work the subject is covered by the following statutes: Ariz. R. S. 1913 sec. 584; Ark. Dig of Stats. 1904 sec. 4131-4433; Cal. C. C. P. 1906 sec. 473, 1916; Colo. Code Ann. 1911 sec. 81; Idaho Rev. Codes 1908 sec. 4439-4442; Iowa Ann. Code 1897 sec. 3755, 4091; Kans. Gen. Stats. 1909 secs. 5899, 5900 and 6191; Mont. Rev Codes 1907 secs. 6794, 6795; Mo. R. S. 1909 sec. 2022; Neb. R. S. 1913 secs. 7883, 8207; N. Dak. Rev. Codes 1905 sec. 7063; S. Dak. C. C. P. 1908 secs. 301, 302; Okla. Comp. Laws 1909 sec. 5825; Oregon Laws 1910 sec. 174; Tex. Civ. Stats. Ann. 1913 art. 2019; Utah Comp. Laws 1907 sec. 3293; Wash. Rem. and Bal. Code 1910 secs. 399, 464; Wyo. Comp. Stats. 1910 secs. 4601, 4650.

CHAPTER CI.

DEFENSES IN ACTIONS ON COVENANTS.

2081. Denial of breach of covenant. | 2082. Accord and satisfaction.

2081. Denial of breach of covenant.

I. The defendant alleges that he duly performed all the conditions of the contract set forth in the complaint on his part to be performed, and [*here state the performance following the words of the covenant*].

2082. Accord and satisfaction.

I. [*Follow Form 1890.*]

[*For other forms see Chapter LXXXVI and other Chapters giving forms of defenses in the various other actions on contract.*]

CHAPTER CII.

DEFENSES IN ACTIONS ON CONTRACTS OF EMPLOYMENT.

2083. Denial of performance by plaintiff.
2084. Performance by defendant.
2085. Plaintiff's failure preventing defendant's performance.
2086. Alleging plaintiff's discharge for misconduct.
2087. Abandonment of the employment by plaintiff.
2088. Termination of service by notice under the terms of the contract.
2089. Discharge on account of plaintiff's incompetency.
2090. Breach of entire contract by plaintiff.

2083. Denial of performance by plaintiff.

I. The defendant denies that the said plaintiff has performed the conditions of said contract of employment mentioned in the complaint on his part to be performed; and on the contrary thereof alleges that the said plaintiff has wholly omitted to [*here state breach specifically as in a complaint*].

2084. Performance by defendant.

I. The defendant alleges that he fully performed all the conditions of said contract of employment on his part to be performed, and on the .... day of ....., 19.., manufactured the said [*name articles*] and delivered the same to the plaintiff [*or* tendered the same to the plaintiff and has ever since been and still is ready and willing to deliver the same, but that the plaintiff refused and still refuses to accept the same, and pay therefor, *or otherwise fully set forth the acts of performance with particularity*].

2085. Plaintiff's failure preventing defendant's performance.

I. That at the time of making said agreement, the plaintiffs agreed, in writing, with this defendant, that in consideration that he would deliver to them, at their warehouse in ....., the said quantity of shelled corn, they, the said plaintiffs, would pay this defendant twenty cents a bushel

therefor, and would furnish to this defendant a thresher to thresh said corn for one cent a bushel.

II. That the said plaintiffs failed and refused to furnish said thresher, though this defendant, on the .... day of ....., 19.., requested them so to do; whereby this defendant was disabled from performing his said contract.

2086. Alleging plaintiff's discharge for misconduct.

I. The defendant alleges that by the terms of said contract of employment it was provided that the plaintiff should [*here set forth terms of the agreement which the plaintiff breached, also set forth provision authorizing discharge if there be any*].

II. That notwithstanding the said agreement on the part of the said plaintiff, and in violation thereof, the said plaintiff on and between the .... day of ....., 19.., and the .... day of ....., 19.., did not [*here negative performance of the agreement in question, and state affirmatively the misconduct charged, as in a complaint*].

III. That by reason of the said violation of his said agreement by the said plaintiff, this defendant on the .... day of ....., 19.., discharged the said plaintiff from his employment, as he of right might do, and that such discharge constitutes the supposed breach of the contract of employment aforesaid, which is alleged in the complaint.

2087. Abandonment of the employment by plaintiff.

I. The defendant alleges that on or about the .... day of ....., 19.., the plaintiff wilfully abandoned the employment of the defendant, and thereafter refused to render any service to defendant under his said contract of employment, although requested by defendant so to do.

2088. Termination of service by notice under the terms of the contract.

I. The defendant alleges that the said contract of employment provided among other things that [*here set forth the provisions of the contract providing for the termination of the employment by notice, e. g.*, either party thereto might terminate the same by giving to the other party thirty days,

notice in writing of his desire and intention to terminate said employment. *If the provision be set forth in the complaint this allegation will, of course, be unnecessary*].

II. That pursuant to the terms of said contract, and on the .... day of ....., 19.., this defendant gave to the plaintiff a written notice stating that he desired to and did thereby terminate said contract of employment on the .... day of ....., 19.., whereby the said contract became and was terminated on said last named date, and the defendant relieved from all liability thereunder; and defendant denies that plaintiff has rendered any service to the defendant after said last-named date under said contract or otherwise.

2089. Discharge on account of plaintiff's incompetency.

I. The defendant alleges that by the said contract of employment the plaintiff agreed to perform for the defendant the services of a competent engineer in charge of defendant's stationary engine [*or otherwise state the character of the service*], which services the plaintiff at the time of the contract represented himself able and competent to perform.

II. That the defendant, relying on the truth of such representation, thereupon entered into said contract of employment, but that the plaintiff was not a competent engineer, and was not in fact a competent stationary engineer and unable to perform, and did not in fact perform the services of such an engineer in this [*here set forth the nature of the incompetency as fully as possible*].

III. That by reason of the plaintiff's aforesaid incompetence on the .... day of ....., 19.., the defendant discharged the said plaintiff as he lawfully might do.

2090. Breach of entire contract by plaintiff.

I. That the services mentioned in the complaint were rendered under an express and entire contract by the terms of which plaintiff agreed to render services to the defendant for the term of one year from ....., 19.., at a compensation of ..... dollars monthly to be paid at the end of each month.

II. That on the .... day of ....., 19.., the plaintiff in violation of his said contract and without just cause or

provocation abandoned his said employment and refused to carry out said contract whereby the defendant was released from any further obligation to the plaintiff under said contract.

III. That the defendant had fully paid to the plaintiff all sums which had become due to him under said contract, prior to such abandonment by the plaintiff.

CHAPTER CIII.

DEFENSES IN ACTIONS OF BREACH OF PROMISE OF MARRIAGE.

2091. Denial of promise.
2092. Denial of plaintiff's readiness.
2093. Denial of breach.
2094. Bad character of plaintiff at time of promise.
2095. Bad character of plaintiff after promise.

2091. Denial of promise.

The defendant denies that he at any time promised or agreed to marry the plaintiff, as in said complaint alleged.

2092. Denial of plaintiff's readiness.

The defendant denies that the plaintiff has at any time been ready or willing to marry the defendant, and defendant denies that the plaintiff at any time offered to marry the defendant, as in the said complaint alleged.

2093. Denial of breach.

The defendant denies that he at any time refused to marry the plaintiff, but on the contrary thereof alleges that on or about the .... day of ....., 19.., he offered to marry the plaintiff, and ever since said date has been and now is ready and willing to marry the plaintiff, which fact the plaintiff well knew.

2094. Bad character of plaintiff at time of promise.

I. The defendant alleges that at the time of the making of the promise in the said complaint alleged the plaintiff was unchaste [*or* habitually intemperate], and generally reputed among her neighbors so to be.

II. That defendant was wholly ignorant thereof at that time.

III. That upon being informed thereof, the defendant refused to marry the plaintiff.

2095. Bad character of plaintiff after the promise.

I. That after the time mentioned as the time of said supposed promise, and on the .... day of ....., 19.., at ....., the plaintiff, without the connivance of the defendant, had carnal connection with one M.... N....

II. [*As III in preceding form.*]

CHAPTER CIV.

DEFENSES IN ACTIONS ON SALES.[1]

2096. Alleging breach of contract as to delivery.
2097. The same, as to quality.
2098. Breach of warranty in sale.
2099. That goods did not correspond to contract.
2100. That goods did not correspond to sample.
2101. Denial of plaintiff's performance.
2102. Another form, sale of real property.
2103. Abandonment of contract by plaintiff.
2104. Excuse for defendant's nonperformance.
2105. Payment.
2106. Rescission by mutual consent.

2096. Alleging breach of contract as to delivery.

I. The defendant alleges that it was part of the agreement of sale referred to in the complaint, that the plaintiff should deliver the said goods sold, at ....

II. That the said goods have not been so delivered, nor tendered, and have not been received or accepted by defendant.

2097. The same, as to quality.

I. That it was a part of the agreement referred to in the complaint, that the [furniture therein mentioned should be made of rosewood].

II. That the said [furniture] was not [made of rosewood] but was made of [*state fact*].

III. That, therefore, the defendant, on the .... day of ....., 19.., and as soon as he discovered the defect, returned the same to the plaintiff [*or* duly tendered the same back to the plaintiff, and has ever since been and still is, willing to return them].

2098. Breach of warranty in sale.

I. The defendant alleges that at the time of the sale of the said goods [*or other property, describing the same*], de-

[1] For defenses which are common to many actions, including actions on sales, see first chapters under the head of "Answers."

scribed in the complaint, the plaintiff warranted the same to be [*here state warranty, as:* genuine china ware].

II. That the said goods were not in fact genuine china ware.

III. [*As in last preceding form if defendant has refused to accept; if goods are retained by defendant and damages are sought by way of counter-claim, see complaints for breach of warranty.*]

2099. That goods did not correspond to contract.

I. The defendant alleges that it was agreed as part of the said contract of sale that the said [*describe the property sold*] should be [*here state agreement, as for example,* first class potatoes free from rot].

II. That when the said potatoes were offered by the plaintiff to the defendant in pretended compliance with said contract, the defendant examined the same and found, as the fact was, that the said potatoes were not first class potatoes, and that twenty per cent. thereof were rotten [*or otherwise describe the defect, according to the fact*], whereupon the defendant refused to receive the same, and notified the plaintiff of such refusal, and that defendant has not accepted the same or any part thereof.

2100. That goods did not correspond to sample.

I. The defendant alleges that at the time of the making of the said contract of sale mentioned in the complaint, the plaintiff exhibited to the defendant a sample of the said goods so to be sold, and agreed that the said goods would and should be in all respects equal in quality to the said sample.

II. That when the said goods were offered by the plaintiff to the defendant in pretended compliance with said contract, the defendant found, as the fact was, that the same were not equal in quality to the said sample in this [*here state nature of defects*], whereupon [*state refusal to receive, and non-acceptance, as in last preceding form*].

2101. Denial of plaintiff's performance.

That the plaintiff has not performed the conditions of said agreement on his part; but, on the contrary, has wholly omitted [*here state breach, as if in a complaint against him*].

2102. Another form, sale of real property.

I. That the plaintiff, by said agreement, undertook to convey the property therein mentioned to the defendant free from all incumbrances.

Or: I. That the said agreement contained a stipulation, on the part of the plaintiff, of which the following is a copy [*copy of provision as to title*].

II. That there was then, and still is, a mortgage on the same, in the sum of ..... dollars, unsatisfied of record, in book ...., page .... of Mortgages, in the office of the register of deeds of the county of .....

2103. Abandonment of contract by plaintiff.

That on the .... day of ....., 19.., and before the time for the defendant to perform said contract on his part, the plaintiff gave notice in writing to the defendant that he had determined not to take the [land]; and the plaintiff abandoned the agreement, and ever since wholly failed to perform it.

2104. Excuse for defendant's non-performance.

That on ....., 19.., before the time fixed in said agreement for defendant to perform his part thereof, plaintiff notified defendant that he would not deliver said goods to defendant and thereupon defendant abandoned said agreement.

2105. Payment.

That on ....., 19.., he paid to plaintiff ..... dollars in full payment for said goods.

2106. Rescission by mutual consent.

That on ....., 19.., said sale was rescinded by mutual agreement of plaintiff and defendant and thereupon defendant returned said goods to plaintiff and plaintiff received the same from defendant in full satisfaction and discharge of any and all claims arising out of the transaction alleged in the complaint.

CHAPTER CV.

DEFENSES IN ACTIONS ON WARRANTIES.

2107. Denial of warranty. | 2108. Denial of breach.

2107. Denial of warranty.

I. The defendant denies that he at any time represented or warranted to the plaintiff that any sum whatever was due upon said note [*or*, that said horse was sound, or kind, or true, or gentle, or quiet in harness], as alleged [but that the plaintiff purchased said .... with notice [*here state defect, if any*], and not relying on any representations of the defendant].

2108. Denial of breach.

The defendant denies that at the time of the said sale mentioned in the complaint the said horse was knee-sprung, or [*here deny breach of the other terms of the warranty, if any, in the disjunctive*].

CHAPTER CVI.

DEFENSES IN ACTIONS AGAINST AGENTS, BAILEES, CARRIERS AND TRUSTEES.

2109. Special denial of agent's negligence in sale.
2110. Denial of agent's negligence in giving credit.
2111. Denial of agent's negligence in services.
2112. Denial of bailment.
2113. That bailment is held as a pledge.
2114. Denial that defendant was a common carrier.
2115. Denial of employment.
2116. Denial of delivery of goods.
2117. Denial of loss.
2118. That the contract was special.
2119. That the damage was by plaintiff's fault.
2120. That the goods were lost by a risk for which defendants were not liable.
2121. That the value of the goods lost was agreed on.
2122. Denial of trust.

2109. Special denial of agent's negligence in sale.

The defendant denies that he was in any respect negligent in or about the selling of the said goods in the complaint described, and alleges that he sold the same as soon [*or* for as large a price] as with due diligence he could.

2110. Denial of agent's negligence in giving credit.

The defendant alleges that he sold said goods to one M.... N...., who was then a merchant at ..... in good standing and credit, for the sum of ..... dollars; and for the payment of which sum he took the bill of the said M.... N...., drawn on and accepted by one O.... P...., payable in .... months after date, which bill was at the time held and considered an approved bill, and defendant denies that he was negligent in giving such credit or in taking said bill, and further denies that said M.... N.... was then embarrassed or insolvent, or that defendant knew him to be so.

2111. Denial of agent's negligence in services.

Defendant denies that he was negligent in or about [the stowing of said cargo], but used due care and diligence there-

in; and the alleged loss [*or* injury], if any, accrued, not through the fault of the defendant, but [*briefly indicating the cause*].

2112. Denial of bailment (sustained in Beach v. Berdell, 2 Duer, 327).

I. The defendant denies that said [*subject of bailment*] was the property of said [*alleged bailor*], or that it was deposited with the defendant by him or his agents.

II. That the same was the property of one M.... N...., to whom the possession of it belonged when this action was brought.

III. That before the commencement of this action the defendant had, on the demand of said M.... N...., the true owner, delivered the same to him.

2113. That bailment is held as a pledge.

I. The defendant alleges that on or about the .... day of ....., 19.., the defendant loaned to the plaintiff the sum of ..... dollars, which loan is still due and unpaid, and that the said [*property bailed*], was thereafter [*or* at the time of said loan], delivered by the plaintiff to the defendant as security for the repayment of said loan, and is still held by the defendant for that purpose.

2114. Denial that defendant was a common carrier.

The defendant denies that he is or was at the time mentioned in the complaint, a common carrier.

2115. Denial of employment.

The defendant denies that he ever undertook or agreed to safely carry the said goods to ..... or to deliver them there to ....., or that the plaintiff ever paid them any reward for any such service, or ever agreed to pay any such reward.

2116. Denial of delivery of goods.

The defendant denies that the plaintiff ever delivered to him the goods mentioned in said complaint, or that he received the same.

2117. Denial of loss.

The defendants deny that the said goods were lost to said ..... through any negligence or misbehavior of the defendants, and deny that they have any knowledge or information sufficient to form a belief whether the said goods were ever lost to said .....

2118. That the contract was special.

That the goods mentioned in the complaint were delivered by the plaintiffs to, and received by, the defendants, upon a special contract between them, whereby it was provided that [*here set forth matter relied on, with averments bringing the goods within it*].

2119. That the damage was by plaintiff's fault (sustained by Hutchinson v. Guion, 28 L. J. (n. s.) C. B. 63).

I. The defendant alleges that the goods mentioned in the complaint, called ....., were a corrosive and destructive substance, rotting casks and cask-hoops, and other substances in contact with it, which the plaintiffs knew, but which the defendant did not know, and could not reasonably be expected to know.

II. That the plaintiffs did not inform the defendant of the destructive nature of the goods, and negligently delivered the same to the defendant in bulk, and thereby induced the defendant to believe that the same might be placed in contact with casks, cask-hoops, and other substances, safely; and they in consequence stowed the same among ....., whereby the injury complained of was caused, and not otherwise.

2120. That the goods were lost by a risk for which defendants were not liable (sustained by Dorr v. N. J. S. N. Co., 11 N. Y. 485).

I. The defendants allege that the merchandise mentioned in the complaint was delivered by the plaintiffs to the defendants, and by them received on board the steamer Lexington, under and in pursuance of a special contract made between them for the transportation of the same from

New York to Stonington, of which the following is a copy [*copy of the contract*].

II. That while the merchandise was well and properly stowed on board the steamboat, and being carried pursuant to the contract, and without any carelessness or misconduct of defendants or their servants, or any defect of the boat or its equipments, the boat, by mere casualty and accident, took fire, and was consumed, with its cargo, including the merchandise of the plaintiffs; and thereby, by accident and casualty of fire, and not by any negligence, misconduct, or default of the defendants, the merchandise was not delivered at Stonington, and became lost to the plaintiffs.

2121. That the value of the goods lost was agreed on.[1]

I. The defendant alleges that at the time of the delivery of said property by the plaintiff to the defendant a written contract was entered into between the parties, by which it was mutually agreed, as a part of the contract of carriage, that the true value of said property was ..... dollars [*or*, did not exceed the sum of ..... dollars, and that the liability of defendant in case of loss or injury should not exceed that sum] [*or set forth copy of the contract*].

II. That previous to the commencement of this action the defendant duly tendered to the plaintiff the said sum of ..... dollars, but that plaintiff refused to accept the same, and the defendant has kept the said tender good, and now brings the said sum into court for the use of the said plaintiff, and in continuance of said tender.

2122. Denial of trust.

That the plaintiff did not deliver, and the defendant did not receive, the said bond and mortgage, upon the trust and confidence alleged; but the defendant received the same as and for his own property, absolutely, and without any trust thereto attached.

[1] An agreement, fixing the value of the property at or not exceeding a certain sum is valid, but an arbitrary stipulation restricting damages in case of loss is invalid. Ullman v. C. & N. W. Ry. Co., 112 Wis. 150; 88 N. W. 41, 1103.

CHAPTER CVII.

DEFENSES IN ACTIONS AGAINST SHERIFFS.

2123. Denial of plaintiff's title.
2124. Denial of taking.
2125. Justification of taking under writ of replevin.
2126. Justification under an execution against a third person.
2127. Justification under attachment.
2128. Allegation of fraudulent assignment.
2129. Return of debtor after escape.

2123. Denial of plaintiff's title.[1]

The defendant denies that [he has any knowledge or information sufficient to form a belief] that at the time alleged in the complaint, or at any other time, the plaintiff was lawfully, or otherwise, possessed of the goods and chattels mentioned and described in the complaint, or any or either of them, or any part thereof; or that the said goods, and chattels or any or either of them, or any part thereof, were then, or ever since have been, or now are, the property of the plaintiff, or that the same were or are of the value of ..... dollars, or that said property composed the stock of goods in the store of the plaintiff at the place alleged in the complaint, or at any other place.

2124. Denial of taking.

The defendant denies that at the time alleged in the complaint, or at any other time at the place alleged in the complaint, or at any other place, the defendant wrongfully took the said goods and chattels from the possession of the plaintiff or that he still unjustly detains the same, to the damage of the plaintiff ..... dollars, or any other sum, or that by reason of the taking alleged in the complaint, or of any act or acts of the defendant, the plaintiff has sustained damage to the amount of ..... dollars, or any damage whatever.

[1] If the defendant took the property from the plaintiff's possession it will be necessary to plead title in a third person under whom he shows himself entitled to hold the same, in addition to a denial of plaintiff's title.

2125. Justification of taking under writ of replevin.

I. The defendant alleges that at the time mentioned in the complaint the defendant was the sheriff of the county of ..... in this state, duly elected [*or* appointed] qualified and acting as such.

II. That in an action brought by one M.... N.... against one O.... P.... in the .... court of ..... to recover the possession [among other things] of the property mentioned in the complaint in this action, said M.... N.... delivered to this defendant a duly executed affidavit for replevin, as required by law, made by him [*or* made in his behalf] and a notice indorsed thereon, describing the property mentioned in the complaint, and requiring this defendant to take the same from said O.... P...., and deliver it to said M.... N....; and at the same time delivered to this defendant, as such sheriff, a written undertaking as required by law in such case, of which affidavit, notice, and undertaking copies are hereto annexed as a part of this answer [*or otherwise fully and accurately describe the papers made necessary by the statute of the particular state to justify a seizure of the property in an action of replevin or an action for claim and delivery*].

III. That by virtue of said proceedings the defendant took and detained the goods mentioned in the complaint, which are the acts of which the plaintiff complains.

2126. Justification under an execution against a third person.

And for a further and separate defense, the defendant denies the allegations of the complaint in manner and form as therein alleged, and alleges:

II. That heretofore, in an action in the ..... court of ....., wherein M.... N.... was plaintiff and O.... P.... was defendant, judgment was, on or about the .... day of ....., 19.., duly rendered in favor of the said M.... N...., plaintiff in said action, against the said O.... P.... the defendant therein, for the sum of ..... dollars, as by the judgment-roll in said action, on file in the office of the clerk of said court, more fully appears.

III. That afterwards, and upon the .... day of ....., 19.., a transcript of the said judgment was duly filed, and

the said judgment was duly docketed in the office of the clerk of the county of ..... and afterwards, upon the same day, an execution against the property of O.... P...., based upon the said judgment, was issued in due form of law, directed to and delivered to this defendant as sheriff of the said city and county of ....., for service; whereby, after containing the statement and recital of the matters by law required to be stated and set forth in such case, and after setting forth that the sum of ..... dollars was then actually due on the said judgment, this defendant was in substance commanded to satisfy the said judgment out of the personal property of the said judgment-debtor within this defendant's county; or if sufficient personal property could not be found, then out of the real property in his county belonging to such judgment-debtor on the day when the said judgment was so docketed in his county, or at any time thereafter, in whose hands soever the same might be, and to return the said execution within sixty days after its receipt by him, as required by law [*or otherwise properly set forth the contents of the execution or other writ, according to the statute of the particular state*].

IV. That, under and by virtue of the said execution, this defendant, as sheriff of the county of ..... and not otherwise, by one of his general deputies, levied upon certain goods and chattels of the character and description of those mentioned and described in the complaint, and took the same into his custody, a schedule of which property so levied upon and taken is hereunto annexed as a part of this answer, and marked "A," which defendant believes to be a portion of the goods and chattels referred to in the complaint, and that the said levy and taking and detention as aforesaid constitute the supposed wrongful taking in the complaint alleged.

V. But this defendant, upon his information and belief, alleges that the goods levied on as aforesaid were at the time of said levy the property of the said O.... P.... or the said O.... P.... had an interest therein liable to levy and sale under execution.

2127. Justification under attachment.

I. [*As in last preceding form.*]

II. The defendant alleges, upon information and belief, that heretofore, to-wit, on or about the .... day of ....., 19.., in a certain action theretofore brought in the ..... court of ..... county, wherein one E.... F.... was plaintiff and G.... H.... was defendant, a warrant of attachment was duly and regularly issued out of said court and directed and delivered to this defendant, commanding and requiring this defendant as sheriff aforesaid, to [*here set forth commands of writ*] [*or*, of which warrant a copy is attached hereto marked Exhibit A, and made part hereof].

III and IV. [*As in IV and V of last preceding form, with necessary incidental changes.*]

2128. Allegation of fraudulent assignment.

I. [*Allege facts showing that defendant was and is a creditor of the assignor, and the judgment obtained, if any.*]

II. That the plaintiffs were possessed of said goods under and by virtue of a pretended assignment thereof by said [*debtor*] to them for the benefit of his creditors, dated on or about the .... day of ....., 19..

III. That the same was executed by said [*debtor*] with intent to hinder, delay and defraud his creditors, and that no bond was executed or filed by the said plaintiffs upon receipt of said assignment, as required by [*name the statute*] [*or otherwise state the defects in the assignment according to the fact*], and that the said assignment was fraudulent and void as against this defendant and other creditors of said [*assignor*].

2129. Return of debtor after escape.

I. That the said M.... [*the prisoner*] wrongfully, and without the privity of the defendant, escaped from his custody.

II. That before the commencement of this action, to-wit, on the .... day of ....., 19.., the said M.... voluntarily returned into the defendant's custody [*or*, upon fresh pursuit the defendant retook said M.... into his custody], where he ever since has remained by virtue of the process mentioned in the complaint.

CHAPTER CVIII.

DEFENSES IN ACTIONS OF DECEIT.

2130. Denial of sale of goods.
2131. Denial of representations alleged.
2132. Admission of certain representations and denial of their falsity.

2130. Denial of sale of goods.

The defendant denies that he at any time sold the [*describe property*] to the plaintiff as alleged in the said complaint.

2131. Denial of representations alleged.

The defendant denies that he at any time made any of the representations to the plaintiff alleged in the complaint.

2132. Admission of certain representations and denial of their falsity.

The defendant admits that he stated and represented to the plaintiff that [*here state representatives admitted*] and alleges that the said representations so made were in fact true, and the defendant denies that he at any time made any other or different representations than those herein admitted.

CHAPTER CIX.

DEFENSES IN ACTIONS FOR NEGLIGENT INJURIES.

2133. Denying injury and defendant's negligence.

2134. Admitting the fact of injury but denying defendant's negligence.

2135. Another form, alleging defendant's due care and plaintiff's contributory negligence.

2136. Collision in highway; allegation of plaintiff's negligence.

2137. Negligence of a fellow servant.

2138. Contract relieving defendant from liability for ordinary negligence.

2139. Denial of ownership or control of place or instrument of injury.

2140. Contributory negligence.

2133. Denying injury and defendant's negligence.

The defendant denies that he has any knowledge or information sufficient to form a belief that plaintiff was injured, as alleged in said complaint, and denies * that either this defendant or his servants were in any respect negligent in the construction or operation of said machine [*or otherwise negative the particular negligence charged*], or that the plaintiff's said injury, if any was in fact received by him, was caused or contributed to by any negligence on the part of the defendant or his servants.

2134. Admitting the fact of injury, but denying defendant's negligence.

The defendant admits that the plaintiff was injured at the time and place in said complaint alleged, but defendant denies that he has any knowledge or information sufficient to form a belief as to whether said injury was in any respect serious or resulted in a broken leg [*or otherwise, according to allegations of the complaint*], as alleged in the complaint; and defendant denies [*proceed as in last preceding form after the* *].

2135. Another form, alleging defendant's due care and plaintiff's contributory negligence.[1]

[*After denying or admitting the injury, as in either of two preceding forms, proceed*]: and defendant alleges that the defendant and his servants used due care and diligence [about the construction of the said building, *or*, in repairing said street, and replacing the pavement thereof, *or*, in guarding the said excavation with proper bulwarks, and in putting up lights during the night-time, *or otherwise according to the allegations in the complaint*] and that said injury, if any was in fact received, was not caused by any negligence on the part of the defendant or his servants, but was caused [*or*, directly contributed to] by the negligence and want of ordinary care on the part of the plaintiff.

2136. Collision in highway, allegation of plaintiff's negligence.

That at the time mentioned in the complaint the defendant was driving his said gig in the highway, and the horse of the plaintiff, being at the same time there, was so carelessly, negligently, and improperly managed by the plaintiff, that by reason thereof the gig of the defendant, without any fault on the part of the defendant, and by want of due care in the management of his horse by the plaintiff, was driven against said horse, and thereby said horse sustained the injury alleged; and that if any damage happened to said horse, it was caused by the plaintiff's said negligence, and not by the fault of the defendant.

2137. Negligence of a fellow servant.

The defendant, further answering, alleges that the injuries received by the plaintiff [if any were in fact received] were caused solely by the negligence and want of ordinary care of one C.... D...., who was then a fellow-servant of the said plaintiff in the employ of the defendant, and not otherwise.

[1] Contributory negligence is generally held to be an affirmative defense, and should be alleged in the answer unless it is negatived by the complaint, in which case a denial of the allegations of the complaint will suffice.

2138. Contract relieving defendant from liability for ordinary negligence.

I. The defendant alleges that prior to the happening of the said accident set forth in the complaint, and as part of the contract of employment entered into between the plaintiff and defendant, the said plaintiff entered into a written contract of which a copy is hereto annexed and made part hereof, marked Exhibit A, and that said contract was in full force and effect at the time of the said accident.

II. That the said accident, and resulting injuries to the plaintiff, were in fact caused by [*here set forth cause of accident, bringing it within the causes for which the agreement exempts the defendant from liability*].[2]

2139. Denial of ownership or control of place or instrument of injury.

The defendant denies that at the time of the injuries alleged in the complaint the defendant was the owner or had possession or control of the premises in which the said hole or hatchway was [*or*, of the said wagon which caused the said injury, *or otherwise describe the instrument of injury according to the fact*].

2140. Contributory negligence.

That the said accident was proximately caused and contributed to by the negligence and want of ordinary care of the plaintiff, in this that he [*state the negligent act or acts of the plaintiff as for example*, that he drove, *or* stepped upon the defendants' railway track at the place of said accident without either looking or listening at a reasonable distance therefrom for approaching trains and that had he looked at a distance of fifty feet from said track he could have seen the defendants' train for a distance of half a mile].

[2] See on this subject, Peterson v. C. & N. W. Ry. Co., 119 Wis. 197; 96 N. W. 532.

CHAPTER CX.

DEFENSES IN ACTIONS FOR CONVERSION OR INJURIES TO PERSONAL PROPERTY.

2141. Denial of plaintiff's ownership.
2142. Denial of the bailment.
2143. Denial of conversion.
2144. Denial of detention.
2145. That defendant has a lien on the goods by a pledge.
2146. That defendant has a lien for labor.
2147. Attorney's lien for services.
2148. Denial of assignment of cause of action for conversion.
2149. That the goods were seized under an attachment, and that the plaintiff is a fraudulent grantee.
2150. Killing dog worrying sheep. (Wisconsin.)

2141. Denial of plaintiff's ownership.

The defendant denies that at the time of the alleged conversion the plaintiff was the owner, or entitled to the possession, immediate or otherwise, of the goods mentioned in the complaint.

2142. Denial of the bailment.

The defendant denies that he ever received the plaintiff's goods mentioned in the complaint, as alleged therein.

2143. Denial of conversion.

The defendant denies that he at any time took or converted to his own use the said property described in the complaint, or ever refused to deliver the same to the plaintiff.

2144. Denial of detention.

The defendant denies that he now does or at any time did detain the said goods [*or* deeds], or any or either of them, from the plaintiff, as alleged in said complaint.

2145. That defendant has a lien on the goods by a pledge.

The defendant alleges that at the time he received said goods, on or about ....., 19.., it was agreed between the

plaintiff and the defendant, in consideration of the defendant's advancing to the plaintiff ..... dollars, that the defendant should have a lien on the said goods and deeds until repayment thereof, with interest; that the defendant advanced to the plaintiff ..... dollars, but the plaintiff has not repaid the same, with interest [*or*, has only repaid the sum of ..... dollars of said loan], leaving ..... dollars, with interest from ....., 19.., still owing thereon. Wherefore the defendant detained [and still detains] the said goods and deeds.

2146. That defendant has a lien for labor.

The defendant alleges that said wagon was delivered by the plaintiff to the defendant, who is and was a wagon maker, on or about the .... day of ....., 19.., for the purpose of being repaired, and was in fact repaired by the defendant, and that the reasonable value of said repairs was the sum of ..... dollars, no part of which sum has been paid by the plaintiff, though often demanded, and that the defendant now holds and detains said wagon by virtue of his lien thereon for the amount of said repairs, and not otherwise.

2147. Attorney's lien for services.

I. The defendant alleges that he is and was at all times hereinafter mentioned an attorney at law, duly admitted and practicing as such at ..... and that the plaintiff on or about the .... day of ....., 19.., retained the defendant as such attorney to prosecute a certain action against one E.... F.... [*or otherwise state the character of the business*].

II. That at the time of such retainer, and in pursuance thereof, the plaintiff deposited with the defendant, as such attorney, the said deeds [*or other papers*] mentioned in the complaint, and that thereafter the defendant performed legal services in the prosecution of said action for the plaintiff, which were reasonably worth the sum of ..... dollars, and necessarily advanced and expended for traveling expenses, officers' fees and other necessary expenses, at plaintiff's request, the sum of ..... dollars, no part of which sums have been paid to the defendant [except the sum of ..... dollars], though often demanded.

III. That defendant now holds and retains said papers by virtue of his lien thereon for the said services and disbursements, amounting to ..... dollars, and not otherwise.

2148. Denial of assignment of cause of action for conversion.

The defendant denies that [he has any knowledge or information sufficient to form a belief that] the said M.... N.... and O.... P.... ever assigned to the plaintiff their right, title and interest in and to the [trunk, and the contents thereof] mentioned in the complaint; or in and to any claims, demands, or causes of action arising to said M.... N.... and O.... P...., or either of them, for the alleged detention or loss of said [trunk and contents].

2149. That the goods were seized under an attachment, and that the plaintiff is a fraudulent grantee.

I. That one M.... N...., on the .... day of ....., 19.., was indebted to the defendant in the sum of ..... dollars, over and above all legal set-offs, and departed out of the state, or kept concealed within it, with intent to defraud his creditors of their just demands, or to avoid being arrested by the ordinary process of law [*or otherwise, according to the statute of the particular state*].

II. That the defendant applied [*stating the proceedings to obtain an attachment against M.... N...., pursuant to the law of the state*] that a warrant of attachment was duly issued by the said judge to the sheriff of the county of ..... commanding him to attach all the property of the said M.... N...., which warrant was delivered to one O.... P...., a deputy sheriff of said county, to be executed in due form of law.

III. That the plaintiff, on the .... day of ....., 19.., was possessed of the said nine horses, by virtue of a conveyance thereof, made to him by the said M.... N...., with the intent to defraud the creditors of the said M.... N.... of their just debts [*here state facts showing fraudulent intent*].

IV. That the deputy sheriff, by virtue of the said warrant, and the defendant, in aid and by the command of the said

deputy sheriff, did attach, and for the space of two days did safely keep, the said horses as and for the proper goods and chattels of the said M.... N...., which is the same trespass complained of by the plaintiff.

2150. Killing dog worrying sheep (Wis. Stats. 1913 sec. 1621).

The defendant alleges that on the .... day of ....., 19.., and before the committing of the said trespasses in said complaint mentioned, the said dog of the said plaintiff was found, by this defendant, worrying, wounding and killing the sheep of him, the said defendant [*or*, the sheep of one M.... N....]; and thereupon the said defendant, on the .... day of ....., 19.., duly notified the said plaintiff of the said worrying, wounding and killing of said sheep by said dog. That thereafter and on the .... day of ....., 19.., and more than twenty-four hours after the giving of said notice, the defendant found the said dog out of the plaintiff's enclosure and out of the immediate care of the said plaintiff, his owner and keeper, and thereupon killed the said dog, as he lawfully might.

CHAPTER CXI.

DEFENSES IN ACTIONS OF REPLEVIN.

2151. General denial.
2152. Defendant part owner.
2153. Title in defendant or in a stranger.
2154. Lien for storage or freight.
2155. Lien for services.
2156. By sheriff, justifying under an attachment.
2157. That the property was distrained, doing damage.

2151. General denial.[1]

The defendant, answering the complaint of the plaintiff herein, denies each and every allegation in said complaint contained.

2152. Defendant part owner.

That at the several times mentioned in the said complaint, one undivided half of the said goods and chattels was, and still is, the property of this defendant, and not of the plaintiff; and the whole of said goods and chattels then were rightfully in the possession of this defendant.

2153. Title in defendant or in a stranger.

That the goods mentioned in the complaint were the property of the defendant [*or*, the property of one M.... N....], at the time mentioned in the complaint, and not the property of the plaintiff [and that the defendant took and retains possession of the said property by authority and direction of the said M.... N....]

2154. Lien for storage or freight.

I. That on the .... day of ....., 19.., the plaintiff deposited the goods mentioned in the complaint with the

[1] A general denial in replevin puts in issue all the facts and under it the defendant may show title in himself or a stranger, or that defendant never had possession or any other fact which defeats plaintiff's title or right of possession. Timp v. Dockham, 32 Wis. 146. It is believed to be advisable, however, to specially plead such facts, and necessary to do so where the goods were taken by the defendant from plaintiff's possession.

defendant, who was then and still is a warehouseman, for storage [*or*, delivered the goods mentioned in the complaint to the defendant, who was then and still is a common carrier for hire, to be carried to .....], agreeing to pay for the same ..... cents per ton [per month].

II. That the defendant duly performed all the conditions of the contract on his part, and has always been, and still is, ready and willing to deliver the said goods to the plaintiff upon payment of the money due for storage [*or* freight], to-wit, the sum of ..... dollars.

III. That the plaintiff has not paid or tendered the same; wherefore, the defendant detained [and still detains] said goods, as he lawfully might do.

2155. Lien for services.

I. That said goods were manufactured by the defendant, as a carpenter and joiner; and that he detained them by virtue of his lien as a mechanic, and the manufacturer thereof, as security for the payment of ..... dollars, the money due him from the plaintiff for work and labor in manufacturing them.

II. That said sum is still due from the plaintiff therefor, and unpaid; wherefore, the defendant detained [and still detains] said goods, as he lawfully might do.

2156. By sheriff, justifying under an attachment.

I. Denies that he wrongfully detains from the plaintiffs the four cases and two casks containing the goods and chattels mentioned and described in the complaint, or any or either of them, or any part thereof; and he has no knowledge or information sufficient to form a belief, that the said goods and chattels, or any, or any part thereof, were or are the property of the plaintiffs, or that the same were or are of the value of ..... dollars, or that by reason of the detention alleged in the complaint, or of any act of the defendant, the plaintiff has sustained any damage.

II. And further answering, this defendant, upon his information and belief, avers that on the .... day of ....., 19.., M.... N...., was indebted to O.... P.... in a cause of action arising upon contract, in the sum of ..... dollars, with interest thereon from the .... day of ....., 19.., and on or

about the said .... day of ....., 19.., the said O.... P.... commenced an action in the ..... court of the state of ..... against the said M.... N.... for the recovery of the said money and interest, and issued to this defendant a summons in due form for service; and on the same day made application to J.... K...., one of the justices of said court, for a warrant of attachment against the property of the said M.... N...., and presented to the said justice, on the said application, an affidavit or affidavits, whereby it appeared that a cause of action existed against the said M.... N...., specifying the amount of the said claim, and the grounds thereof; and that the defendant was not a resident of the state of ..... but resided at ..... in the state of ..... and that a summons had been issued to the sheriff of the city and county of .....; and at the same time presented to the said justice an undertaking as required by law, with sufficient surety, to the effect that if said defendant in said action recovered judgment, the plaintiff therein would pay all costs that might be awarded to the said defendant, and all damages which he might sustain by reason of such attachment, not exceeding the amount specified in such undertaking, and the amount specified in such undertaking was at least the sum of two hundred and fifty dollars [*or otherwise set forth the attachment proceedings, according to the laws of the state*].

III. That thereupon the said justice issued a warrant of attachment against the property of the said M.... N.... directed to this defendant, as sheriff of the city and county of ....., and required and commanded him to attach and safely keep all the property of the said M.... N...., within his county, or so much thereof as might be sufficient to satisfy the demand of the plaintiff in said warrant of attachment, of $...., with interest thereon as aforesaid, being the amount of indebtedness stated in such attachment, together with all costs and expenses, and that this defendant proceed thereon in the manner required by law.

IV. That the said warrant of attachment was delivered to and received by him as such sheriff as aforesaid, for service on the .... day of ....., 19..; and under and by virtue of said warrant of attachment, he forthwith levied upon and attached four cases and two casks of the character and description of those mentioned and described in the com-

plaint, and took the same in his custody, which the defendant believes to be the goods and chattels referred to in the complaint, and that the said attaching and taking as aforesaid constitute the supposed wrongful detention in the complaint alleged.

V. This defendant, upon his information and belief, avers that the said goods and chattels so attached and taken as aforesaid were, at the time of said attaching and taking, the property of the said M.... N...., or that the said M.... N.... had a leviable or attachable interest therein, or that said goods and chattels were liable to be levied upon, and taken under and by virtue of said attachment.

2157. That the property was distrained, doing damage.[2]

I. That at the times mentioned in the complaint, this defendant [*or*, one M.... N....] was lawfully possessed of the real property upon which the [*cattle*] therein mentioned were taken, to-wit, a certain meadow, called ..... [*or otherwise identify it*] situate at .....

II. That the [*cattle*] alleged in the complaint to have been taken and carried away by this defendant were, at the time therein stated, wrongfully upon said premises of the defendant [*or* of said M.... N....] and then incumbering the same and doing damage thereon.

III. That [acting by command of said M.... N....] this defendant then and there took said property, and removed and carried the same away to a convenient distance, doing no unnecessary damage thereto, and there left the same for the use of the plaintiff.

IV. That these acts are the same of which the plaintiff complains.

[2] It is sufficient in Wisconsin to allege that the defendant or person by whose command he acted was lawfully possessed of the real estate upon which the distress was made, and that the cattle were at the time doing damage thereon. Wis. Stats. 1913 sec. 2679.

CHAPTER CXII.

DEFENSES IN ACTIONS FOR ASSAULT AND BATTERY.

2158. Specific denial of battery.
2159. To preserve the peace.
2160. Plaintiff the aggressor (son assault demesne).
2161. The same, a shorter form.
2162. To preserve the peace.
2163. Defense of possession of his dwelling.
2164. The same, of an inn.
2165. The same, resistance of entry.
2166. Justification of removing plaintiff from railroad car for non-payment of fare.
2167. Defense of possession of goods.
2168. Moderate correction of an apprentice.

2158. Specific denial of battery.

The defendant denies that he at any time struck, wounded or assaulted plaintiff, as in said complaint alleged.

2159. To preserve the peace.

I. [*Deny allegations of the complaint as to beating and wounding.*]

II. The defendant further alleges that at the time mentioned in the complaint the plaintiff had made an assault on one M.... and was then and there beating him [*or*, the plaintiff and one M.... in breach of the peace, were fighting together].

III. That thereupon the defendant, in order to preserve the peace and prevent the plaintiff from further so doing [*or*, in order to preserve the peace and to separate them], gently laid his hands upon the plaintiff, as he lawfully might.

IV. That thereupon the plaintiff [*here may allege assault upon this defendant, and his self-defense, as in next following form*].

V. That the acts above mentioned are the same of which the plaintiff complains.

2160. Plaintiff the aggressor (son assault demesne).

I. That at the time mentioned in the complaint, and just before the time of the commission of the alleged grievances

therein stated, the plaintiff made an assault [*state it as if in a complaint against him*] upon this defendant, and would have beaten and greatly bruised [*or otherwise injured*] him, if he had not immediately defended himself; wherefore he did defend himself, as he lawfully might, and in so doing did necessarily and unavoidably a little beat and bruise [*or otherwise injure*] the plaintiff; and that if the plaintiff sustained any damage, it was occasioned by his first assaulting the defendant.

II. That the acts above mentioned are the same of which the plaintiff complains.

III. This defendant denies each and every allegation of the complaint, except such as are hereinbefore admitted.

2161. The same, a shorter form.

That the plaintiff first assaulted and beat the defendant, who thereupon necessarily committed the acts complained of in self-defense.

2162. To preserve the peace.

I. That as to the alleged assaulting, beating, and ill-treating the plaintiff, the defendant was, at the time thereof, captain of the ship [*or* vessel, *or*, steamboat] called the ....

II. That the plaintiff was then on board of said ship [*or* vessel, etc.] making a great noise and disturbance, and fighting with a certain other person, to-wit, one M.... N...., whom he was striving to beat and wound.

III. Wherefore the defendant, for the preservation of the peace, and to preserve due order on said ship [*or* vessel, etc.], and to separate the said plaintiff and said other person so fighting together, and to prevent the said plaintiff from beating, wounding, and ill-treating such other person, as he would otherwise have done, then, as such captain, gently laid his hands upon the plaintiff, as he lawfully might, for the cause aforesaid; which are the acts of which the plaintiff complains.

2163. Defense of possession of his dwelling.

I. [*Deny beating and wounding.*]

II. The defendant further says, that at the time men-

tioned in the complaint the defendant was lawfully possessed of [*here designate the dwelling*].

III. That the defendant being so possessed thereof, the plaintiff was unlawfully therein, and making great noise and disturbance therein, against the will of the defendant, and disturbing him and his family in the enjoyment of their dwelling; and refused to cease such noise and disturbance, and to go away, although requested by the defendant.

IV. That thereupon the defendant, in defense of the possession of his dwelling, gently laid his hands upon the plaintiff in order to remove him, as he lawfully might.

V. That the acts above mentioned are the same of which the plaintiff complains.

2164. The same, of an inn.

I. [*Deny beating and wounding.*]

II. That at the time mentioned in the complaint the defendant was lawfully possessed of a certain public house [*designate it*].

III. That the plaintiff came into the said house, and then and there made a great noise and disturbance therein, to the disquiet of other persons lawfully there, and of the defendant and his family, in their enjoyment therein, and refused to depart therefrom or cease said disturbance, though requested by the defendant so to do.

IV. [*Continue as in preceding form.*]

2165. The same, resistance of entry.

I and II. [*As in preceding forms.*]

III. That the plaintiff then and there, with force and violence, attempted to break into the said dwelling [*or other possession*], without the leave and against the will of the defendant.

IV. That the defendant thereupon, in order to preserve the peaceable possession thereof, resisted the plaintiff's entrance, and in doing so necessarily assaulted and beat the plaintiff, as he lawfully might; and if the plaintiff sustained any damage, it was occasioned by his own wrong.

V. That the acts above mentioned are the same of which the plaintiff complains.

2166. Justification of removing plaintiff from railroad car for non-payment of fare.

I. That the defendant was, before and at the time when the said grievances were committed, the conductor, and had charge of a passenger-train on the railroad of the .... Railroad Company, running from .... to ....

II. That one of the regulations of said railroad company was, that no person should be permitted to be, and remain, on such train without having a ticket therefor, duly obtained of their authorized agents.

III. That at the time mentioned in the complaint the plaintiff was on the said train, without having a ticket therefor as aforesaid, and upon demand made by this defendant refused to pay any fare in cash.

IV. That the defendant then and there requested the said plaintiff to leave the said train, which the plaintiff refused to do; whereupon the defendant then and there gently laid his hands upon the said plaintiff, and removed him from the train, doing no unnecessary violence, as he lawfully might do; which is the act complained of by the plaintiff.

[V. That the defendant so removed the plaintiff from said train at the station of .... which is one of the usual stopping places on said railroad, *or*, near the dwelling house of one .....][1]

2167. Defense of possession of goods.

I. That at the time in the complaint mentioned the defendant was the owner and in the actual possession of [*describe goods*], and plaintiff was wrongfully about to take and carry away and convert the same to his own use, and defendant requested him to refrain from doing so, but plaintiff persisted, whereupon defendant gently laid his hands upon plaintiff and used sufficient force to cause him to desist from taking the said property, using no more force than was reasonably necessary, and such acts of defendant are those of which plaintiff complains in the complaint herein.

[1] If the statute limits the places where a passenger may be put off for non-payment of fare, the answer should show compliance therewith. Wis. Stats. 1913 sec. 1818.

2168. Moderate correction of an apprentice.

I. That the plaintiff was, at the time mentioned in the complaint, the apprentice of the defendant in his trade and business of a .....; that the plaintiff, then and prior thereto, had conducted himself contumaciously, and refused to obey defendant's lawful commands relating to his duty as such apprentice; that thereupon the defendant moderately corrected him, the plaintiff, for his said misbehavior, which are the acts of which the plaintiff complains.

CHAPTER CXIII.

DEFENSES IN ACTIONS OF FALSE IMPRISONMENT AND MALICIOUS PROSECUTION.

2169. Denial that defendant caused arrest.
2170. Denial of malice and want of probable cause.
2171. Justification of arrest upon suspicion of a felony.
2172. Justification by officer, of the same.
2173. Justification, by officer, of an arrest for breach of peace.
2174. The same, of arrest under criminal process.
2175. The same, of arrest and imprisonment under civil process.
2176. The same, under order of arrest.

2169. Denial that defendant caused arrest.

The defendant denies that he caused or procured said order of arrest [*or*, said process], to be issued, [*or*, denies that he caused the arrest or imprisonment of plaintiff as alleged or otherwise].

2170. Denial of malice and want of probable cause.

The defendant denies that he falsely and maliciously, or without probable and reasonable cause, caused the said plaintiff to be arrested, as alleged or otherwise.

2171. Justification of arrest upon suspicion of a felony.

I. That immediately before the time mentioned in the complaint, a felony was committed [*here briefly state the felony and causes of suspicion against the plaintiff*].

II. That thereupon the defendant, having reasonable cause to suspect the plaintiff of having committed such felony*, arrested him and carried him before M.... N...., a justice of the peace of the town of..... [*or other magistrate*], to be dealt with according to law.

III. That the above acts are the same of which plaintiff complains.

2172. Justification by officer, of the same.

I. That at and immediately before the time mentioned

in the complaint, the defendant was a constable of the town of..... [*or designate other official capacity*].

II. That he was then informed by [*here state sources of information*] that a felony had been committed, in the robbery of [*here state felony, and the grounds of the suspicion of the plaintiff*].

III. That thereupon, believing such information to be true, and acting thereon, as was his duty to do [*continue as in the preceding form, from the**].

2173. Justification, by officer, of an arrest for breach of peace.

I. That at the time mentioned in the complaint [*here state a breach of the peace on the part of the plaintiff, according to the fact, e. g., as in forms in next preceding chapter*].

II. Thereupon the defendant Y.... gave charge of the plaintiff to the defendant Z.... [*the officer*] who was a constable [*or other officer of the peace*], [who then and there had view of the said breach of the peace committed by the plaintiff].

III. That the defendant Z.... [*the officer*], at the request of the defendant Y...., and the defendant Y.... assisting the defendant Z...., then and there gently laid their hands upon the plaintiff, in order to take him into the custody of such officer, and carry him before a justice of the peace [*or other magistrate*], for examination concerning the premises, and to be dealt with according to law.

IV. That the acts above mentioned are the same of which plaintiff complains.

2174. The same, of arrest under criminal process.

I. That before and at the time of the committing of the alleged trespasses, he, the said defendant, was a constable within and for the town of..... in the county of.....

II. That a warrant duly issued by one M.... N...., under his hand and seal, the said M.... N.... then being a justice of the peace within and for the said town of..... and directed to any constable of said.....then was delivered to this defendant as such constable to be executed; whereby he was commanded to arrest the said plaintiff, and have him forthwith before said justice, or some other justice of the

peace for said county of..... there to answer to the charge of having feloniously stolen and carried away the goods and chattels of one..... to the value of.....dollars [*setting forth the tenor or warrant according to its effect*].

III. That by virtue of the said warrant so issued, he, the said defendant, did arrest the said plaintiff, and had him in his custody until he, as soon as he conveniently could, took the said plaintiff before the said justice of the peace, to answer to the complaint aforesaid, as will appear by his return, duly entered on the said warrant [*or*, writ, etc.], which are the acts of which the plaintiff complains.

2175. The same, of arrest and imprisonment under civil process.

I. That at the time mentioned in the complaint, the defendant Y.... [*the officer*] was a sheriff of the county of .....in this state.

II. That on the....day of....., 19.., the defendant X.... [*the one at whose suit the process was issued, or, if he is not made a defendant, one X...., naming the judgment-creditor*] duly recovered a judgment in the.....court of this state, in and for the county of.....against the said A.... [*the plaintiff in the present action*], for the sum of .....dollars, in an action in which the said A....might have been arrested, as provided by the statutes of the state of ....., which judgment, at the time mentioned in the complaint, was in force, and wholly unsatisfied [*or*, unsatisfied in part].

III. That on the....day of....., 19.., an execution against the property of the plaintiff in this action was duly issued on said judgment, and afterwards was returned wholly unsatisfied [*or* unsatisfied in part].

IV. That afterwards, and on or about the....day of ....., 19.., an execution against the person of the plaintiff in this action was duly issued upon said judgment, and delivered to the defendant Y.... [*the sheriff*] to be executed.

V. That by virtue of the said execution, and before the return-day thereof, the defendant Y.... gently laid his hands upon the plaintiff in order to arrest him, and take and detain him under the said execution, which is the same act of which the plaintiff complains.

VI. That the defendant Z...., by the command of the defendant Y...., and in his aid and assistance, did gently lay their hands upon the plaintiff in order to take him into custody; and the defendant Y.... detained him in custody under said execution, according to law; which acts are the same of which the plaintiff complains.

2176. The same, under order of arrest.

I. [*As in preceding form.*]

II. That on or before the time mentioned in the complaint, an order was duly made by the.....court of this state, in and for the county of..... [*or other court or officer*]; whereby [*here recite the commands of the order*].

III. That on, etc., said order was delivered to the defendant [*the officer*] to be executed.

IV. That by virtue of said order [*continue as in preceding form*].

CHAPTER CXIV.

DEFENSES IN ACTIONS FOR LIBEL AND SLANDER.

2177. General outline form of answer, denial, justification and mitigation.

2178. Notice that matter already pleaded in justification will also be proved in mitigation.

2179. Justification of charging plaintiff with corruption and extortion in a public office.

2180. Justification of charge of perjury.

2181. Justification and mitigation.

2182. Justification and denial of malice; in charge of larceny.

2183. Mitigation, republication of news from other papers.

2184. That the alleged libel was a privileged communication.

2185. The same, a shorter form.

2186. That the alleged slander was a privileged communication by a clerk to his employer.

2187. The same, of a fair report of public official proceedings.

2188. Another form.

2189. Privileged statement made in answer to business inquiries.

2190. Privileged communication; petition to supervisors to revoke license of a disorderly house.

2191. Privileged communication from one director to another.

2192. Privileged communication to one having an interest.

2193. Fair comment on conduct of a public officer.

2194. Report by a commercial or mercantile agency.

2195. Answer in action for slander of title.

In both of these actions the codes generally, if not universally, provide that the defendant may both allege the truth of the supposed defamatory matter, and at the same time allege mitigating circumstances to reduce the amount of damages, and his failure to prove the truth will not affect his right to insist upon the mitigating circumstances. These defenses should be pleaded separately, and mitigation should be pleaded only as a partial defense. Doubtless also the defendant may deny the slander and justify in the same answer, or may justify and plead privilege.

2177. General outline form of answer, denial, justification and mitigation.

The defendant, answering the complaint of the plaintiff, denies [*here deny publication or any other material fact or facts which are to be put in issue*].

II. For a second and further defense the defendant alleges [upon information and belief] that the said supposed defamatory words set forth in the complaint herein are true; that, on or about ....., 19.., and prior to the alleged time of the speaking [*or* publishing] of said words the plaintiff feloniously stole and carried away ..... the property of defendant, of the value of ..... dollars, and that the said ..... so stolen is the same property referred to in the alleged slanderous words set forth in plaintiff's complaint.

III. And for a partial defense, and by way of mitigation of damages, the defendant alleges [*here set forth want of malice, provocation, republication of current news, honest belief in truth, with facts on which it was based, etc.*].

2178. Notice that matter already pleaded in justification will also be proved in mitigation (sustained in Howard v. Raymond, 11 Abb. Pr. 155).

And in mitigation of any damages to which the plaintiff might otherwise appear entitled by reason of the publication of said supposed libelous article, this defendant repeats and renews, all and singular, the matters stated under the second defense herein; and will give evidence thereof in mitigation of damages, as well as in justification.

2179. Justification of charging plaintiff with corruption and extortion in a public office.

The defendant answers the complaint of the plaintiff herein, as follows:

For the first defense.—I. The defendant denies knowledge or information sufficient to form a belief, whether the plaintiff was ever at any time a harbor-master of the port of New York, or was ever duly nominated and appointed such harbor-master, as alleged in the complaint; but defendant admits that at the times referred to in the complaint, plaintiff was acting as harbor-master of said port. The defendant admits that the lawfully appointed harbor-masters

of the port of New York have each of them, within the district to which he is specially appointed and assigned, such power and authority as are in the complaint alleged; but defendant denies knowledge or information sufficient to form a belief, whether plaintiff ever had lawful right or appointment to exercise such powers and authority as harbor-master.

II. Defendant denies that the plaintiff had, prior to this action, earned or maintained a good reputation, name, or fame, or that he enjoyed the confidence of his superiors, or that of the public or of his neighbors in the duties of said office, or that he enjoyed or maintained a good character or reputation; and defendant says, that at the times hereinafter mentioned, plaintiff had been guilty of the malpractice and misconduct hereinafter mentioned, and of taking the excessive and illegal fees hereinafter mentioned; and that by reason thereof he became, and was, at all the times mentioned in the complaint, a person of bad name, fame, and reputation.

III. Defendant denies all the allegations in the complaint contained, not hereinbefore specifically admitted.

Second defense.—I. The defendant, further answering, says, that the said supposed libelous matters set up in the complaint are true of the plaintiff, as follows:

II. That the plaintiff, prior to the .... day of ....., 19.., and while acting, or claiming to act, as harbor-master of the port of New York, was guilty of official misconduct in divers instances.

III. That by a rule prescribed by the captain of the port of New York, pursuant to authority vested in him by law, regulating the conduct of harbor-masters, which rule had for a long time been, and still was, on the said .... day of ....., 19.., in force, and well known to plaintiff, harbor-masters were required to discharge their duties in person, and the appointment of a deputy by any harbor-master was prohibited. But notwithstanding this rule, and in violation thereof, the plaintiff at some time prior to said last-mentioned day, but at what precise date defendant does not know and cannot state, did corruptly and unlawfully conspire with, and pretend to appoint one N.... to act, or pretend to act, as deputy harbor-master under the plaintiff.

IV. That the plaintiff and N.... entered into an arrangement and understanding with each other, pursuant to which the plaintiff was accustomed for a long period prior to the .... day of ....., 19.., to direct persons applying to him as harbor-master for berths for vessels, to apply to said N...., and the said N.... was accustomed, with the knowledge and connivance of the plaintiff, to exact illegal and excessive fees for giving berths to vessels of such applicants.

V. That in many instances the plaintiff, and in other instances the said N...., under and in pursuance of the aforesaid understanding and agreement between himself and the plaintiff, did exact from persons applying for berths for vessels illegal and excessive fees.

VI. That the plaintiff, on the .... day of ....., 19.., unlawfully exacted and received from U.... V...., coal merchants, doing business at ..... the sum of ..... dollars, for obtaining a berth for the coal-barge Z.... That on or about, etc., W.... X...., clerk with Y.... & Z...., shipping merchants doing business at ....., applied to the plaintiff for a berth for the ship Y.... That the plaintiff referred him to said N.... who, pursuant to the corrupt and unlawful agreement between N.... and the plaintiff above stated, exacted and received from him the sum of ..... dollars, in addition to the fees allowed by law for giving said ship a berth [*other instances to be stated in a similar way*].

2180. Justification of charge of perjury.

That before the speaking [*or*, publishing] of the words alleged in the complaint, and at a term of the ..... court, duly held at ....., in the month of ....., 19.., before one of the judges of the ..... court, upon trial of an action there pending between one M.... N...., as plaintiff and O.... P.... as defendant, A.... B...., the plaintiff in this action, appeared as a witness for and on behalf of the said M.... N.... and was then and there, in open court, duly sworn, and took oath to speak the truth, the whole truth, and nothing but the truth, touching and concerning the matters in question in the said issue.

II. That the plaintiff, being so sworn, falsely and wilfully, and maliciously deposed and gave evidence, among other things, that [*here set forth that part of the plaintiff's evidence in which he committed perjury*], and that the said plaintiff then knew the said evidence was false and untrue.

III. That in truth [*here negative the plaintiff's evidence, as in an indictment for perjury*].

IV. That the truth of the matters hereinbefore stated were material and pertinent to the issue there tried.

V. That this defendant, in charging the plaintiff with perjury, as alleged in the complaint herein, referred to the said evidence so falsely given by the plaintiff as above set forth.

2181. Justification and mitigation.

For a first defense the defendant alleges that the supposed defamatory words [*or*, libel] in the complaint set forth [and each allegation therein contained] are [is] true of the plaintiff, as follows: that is to say, that before the time alleged in the complaint as the time of speaking of the words [*or*, of the publication of the supposed libel] in the complaint set forth, to-wit, on the .... day of ....., 19.., at ....., the plaintiff did felonioulsy steal and carry away twenty-five bushels of corn, the property of this defendant.

Second. For a second defense, this defendant alleges:

I. That on the .... day of ....., 19.., at .....,this defendant and the plaintiff entered into an agreement that the plaintiff should take from this defendant a piece of land situate in said city, and plant the same with corn, on shares with this defendant,—the plaintiff to be at all the labor and expense of planting said land with corn, and cutting, harvesting, and securing the same, and have as his remuneration therefor one-half of whatever corn should be raised upon said land; which corn was to be equally divided, in the ear, between the plaintiff and this defendant.

II. That the said land was accordingly planted and harvested by said plaintiff; but the said plaintiff, while cutting, harvesting, and securing said corn, or immediately after it was cut, harvested, and secured, instead of fairly and honestly dividing said corn equally with this defendant, fraudulently, dishonestly, and unfairly secreted, carried away, and con-

verted to his own use, without the knowledge or consent of this defendant, a considerable quantity of said corn, with the intent to appropriate the same wholly to his own use, and to give no account thereof to the defendant.

III. That the same being discovered by the defendant, he did thereupon charge the said plaintiff with having stolen said corn, which the plaintiff admitted and confessed [and pretended to express great penitence therefor]; which above facts the defendant will give in evidence on the trial of this action, in mitigation of any damages the said plaintiff may be entitled to recover.

2182. Justification and denial of malice; in charge of larceny.

I. That each and every article in the complaint mentioned as having been charged by defendant to have been stolen by the plaintiff, had, at the time mentioned in the complaint, been taken and stolen from the said defendant.

II. That the defendant is informed and believes that the plaintiff has been, and is, guilty of each and every charge in said complaint alleged to have been made against her by the defendant; and that whatever the defendant has said of or concerning the plaintiff she has said in the full belief of its truth and verity, and in self-vindication and warning to others, and not from any motives of malice towards the plaintiff.

2183. Mitigation, republication of news from other papers (sustained in Howard v. Raymond, 11 Abb. Pr. 153).

The defendant, by way of mitigation of any damages to which the plaintiff might otherwise appear entitled by reason of the republication of said supposed libelous article, alleges that all the matters and things stated under the second defense were, on the .... day of ....., 19.., currently reported and believed in the cities of New York and Brooklyn, and were published in a certain newspaper, called the N.... Z...., published in said city of ..... and were so communicated to this defendant, and were published by him as matters of current public news, he verily believing the same to be true.

2184. That the alleged libel was a privileged communication.

That in the month of ....., 19.., at the city of New York, the plaintiff brought an action against this defendant in the ..... court, for having, as alleged, maliciously, and without probable cause, prosecuted the said plaintiff on a charge of obtaining money by false pretenses, and this plaintiff was arrested in said action by an order of arrest issued therein.

II. That afterwards, on the .... day of ....., 19.., at said city, this defendant did, by his attorney, procure an order from one of the justices of said court, requiring the plaintiff to show cause, at a certain day and place therein named, why this defendant should not be discharged from said arrest, or why the sum in which he was held to bail should not be reduced.

III. That said order was granted upon an affidavit of this defendant, made in answer to an affidavit made by the plaintiff upon which the order of arrest aforesaid was granted, and for the purpose of procuring this defendant's discharge or a reduction of bail as aforesaid.

IV. That the supposed libel in the complaint set forth is a part of said affidavit of this defendant, and was published by him by the presentation of said affidavit to the court upon said motion, and not otherwise.

[V. This defendant denies that he published said supposed libel maliciously, or with the intent charged in the complaint.]

VI. That said supposed libelous matter was pertinent and relevant in said motion, and for the purpose of procuring the relief prayed for therein. [*Or*, That this defendant had reasonable cause for believing, and did in fact believe, at the time of said publication, that the same was true and pertinent, *etc.*, *as above.*]

2185. The same, a shorter form.

That at the time of publishing the words mentioned in the complaint, an action was pending in the ..... court, between [the parties to this action].

II. That at the time this defendant applied to A.... B...., a justice of the said court, for an order of .....;

and upon his application presented to the said justice an affidavit containing the words complained of, which affidavit was pertinent and relevant to the said application.

III. That the defendant did not in any other way publish the said words.

2186. That the alleged slander was a privileged communication by a clerk to his employer.

I. That he was, at the time of uttering the words mentioned in the complaint, the confidential clerk of A.... B....

II. That the said A.... B.... inquired of the defendant the character of the plaintiff [with a view to employing him as a clerk, *or otherwise*], and the defendant then stated to him the matter referred to in the complaint, and that the defendant did not make said statement to any other person, or otherwise publish said words.

III. That the defendant had probable cause for believing, and did believe, the same to be true.

2187. The same, of a fair report of public official proceedings.

I. That on the .... day of ....., 19.., in the course of a certain trial then pending in the ..... court of ..... wherein O.... P.... was plaintiff and R.... S.... was defendant, one M.... N...., counsel for said O.... P.... made a public statement or speech.

II. That the defendants, as publishers and proprietors of the N.... Z...., published in said newspaper a fair and true report of the judicial proceedings had upon such trial, and of the public statement or speech made as aforesaid in the course thereof, which publication is the same publication as that in the complaint set forth [*or*, of which publication the supposed libelous article in the complaint set forth is a part].

III. That defendants deny that they published the same maliciously, or with intent to injure the plaintiff, or with the intent charged in the complaint.

2188. Another form.

I. That on the .... day of ....., 19.., at ..... an action was tried in the ..... court of ..... in which A....

B.... was the plaintiff, and the plaintiff herein was defendant [*or*, an indictment having been found against the plaintiff for ....., he was tried therefor in the court of sessions for the county of ....., *or otherwise*].

II. That the article published in the defendant's newspaper, as stated in the complaint, was a fair and true report of the [testimony of one of the witnesses, named C.... D....] made in the course of the said trial.

III. [*May add paragraph III from preceding form.*]

2189. Privileged statement made in answer to business inquiries.

I. The defendant alleges that prior to the ....day of ....., 19.., the plaintiff had been in the employ of the defendant as a [bookkeeper] and that on or about said date the plaintiff was endeavoring to obtain a like position from one M.... N....; and the said M.... N...., knowing that the plaintiff had been in the defendant's employ, made certain inquiries of the defendant as to the character of the plaintiff and his ability as a bookkeeper, in response to which inquiries the defendant, as he lawfully might, wrote and sent to the said M.... N...., by mail, the letter set forth in the complaint, but did not publish the said letter nor disclose its contents to any other person nor in any other way than that above stated; that said letter was written and sent, and the statements therein made in full belief that the same were true and correct, and without malice on the part of this defendant, and the defendant alleges that said letter was and is a privileged communication.

2190. Privileged communication; petition to supervisors to revoke license of a disorderly house (adapted from Werner v. Ascher, 86 Wis. 349; 56 N. W. 869).

I. The defendants admit that at the times stated in the complaint the plaintiff was a duly licensed saloonkeeper in the town of ..... county of ..... and that on the .... day of ....., 19.., these defendants signed a petition addressed to the board of supervisors of said town, in substance and effect like the petition set forth in said complaint, but defendants deny that they wrote said petition or published

the same or any part thereof, save that they caused the same to be presented to the said town board of supervisors.

II. The defendants further allege that they reside in the immediate vicinity of the plaintiff's said saloon, and that for a long time prior to the making and presentation of said petition the plaintiff did not keep his said saloon in an orderly manner, and that rows and disturbances were very frequent therein, so much so that defendants were kept awake nights by the noise [*state fully the facts*].

III. That on account of the said disgraceful and boisterous disturbances in said saloon, these defendants signed the said petition for revocation of the plaintiff's license, and caused the same to be presented to the said board of supervisors without malice and in the full belief that the statements therein contained are true, and the defendants by reason of the facts above set forth allege that the making of such petition, and the presentation thereof to the said board of supervisors were privileged by law.

2191. Privileged communication from one director to another.

That at the time of the alleged speaking of the words set forth in the complaint herein, the defendant was one of the directors of the ..... Company, and that all of the words spoken of and concerning plaintiff by this defendant was at a meeting of the directors or to other directors of said ..... Company, in relation to the character and fitness of the plaintiff for the position of [*state position*] of said ..... Company, and in no other relation whatever; that the said words were spoken without malice, and defendant alleges that the words complained of were and are privileged communications for which this defendant is not liable to an action.

2192. Privileged communication to one having an interest.

That on or about the .... day of ....., 19.., the plaintiff, who had, prior thereto, been employed by the defendant, applied to one E.... F.... for employment, and that on or about the .... day of ....., 19.., the said E.... F.... requested of the defendant that he would com-

municate to the said E.... F.... any facts within this defendant's knowledge of and concerning the plaintiff's character and integrity; that in response to said request, the defendant did speak the words complained of, as alleged in the complaint herein, without any malice and in good faith, believing the same to be true.

2193. Fair comment on conduct of a public officer.

I. That plaintiff on the ....., 19.., was and still is mayor of the city of ..... duly elected and acting as such.

II. That the words set forth in the complaint were [part of] an article in the defendant's newspaper, called the ....., published at ....., and were and are a fair, and impartial comment upon a matter of public interest, viz. [*state the subject of the article, as, for instance,* upon the conduct of the plaintiff in his public capacity as mayor of the city of ..... in refusing on the ..... day of ....., 19.., to allow one ..... to have the use of the town hall of the said village for the purpose of delivering a lecture therein], and said words were published by the defendant without malice and with an honest belief in their truth.

2194. Report by a commercial or mercantile agency.

I. That the defendant is a corporation duly incorporated under the laws of the State of ....., and engaged in the business of a commercial [*or,* mercantile] agency at .....

II. That in pursuance of its business as a commercial [*or,* mercantile] agency it was at the time set forth in said petition, and is still hired and employed by divers corporations, firms and individuals doing business in the state of ....., and elsewhere, which said corporations, firms and individuals were, and are, interested in ascertaining and being informed of the commercial standing of divers corporations, firms and individuals doing business in the state of ....., and elsewhere, as their agent, to seek for and diligently inquire into the character, credit and commercial standing of said parties so engaged in business as aforesaid, and to communicate the same forthwith to their said employers, all of which communications were to be in strict confidence, and were to be for the sole use, benefit and information of said employers.

III. That, in pursuance of said employment, the defendant was reliably informed that a judgment had been recovered against the plaintiff [*or, otherwise state information forming the basis of the report*], and the defendant, relying upon the truth of such information, and believing it to be true, in good faith, and in pursuance of the duty and contracted obligation to its employers, made the publication in the words and figures fully and at length set forth in the complaint herein, and sent the same to its said employers as a confidential communication; that the defendant made the publication in entire good faith, and without any malice actuating it in the premises.

2195. Answer in action for slander of title.

I. Defendant admits that the plaintiff caused to be printed the advertisement set out in the second paragraph of plaintiff's petition, but denies that the goods mentioned in said advertisement were the property of the plaintiff, and that the intended sale by auction was in the ordinary course of the plaintiff's trade and business.

II. Defendant further admits that he caused to be printed and published the "notice" set out in the third paragraph of plaintiff's petition, but denies that he did so with the meaning in such paragraph alleged.

III. That before and at the time of the publication complained of the plaintiff unlawfully detained from the defendant certain goods [*describe them*] the property of the defendant.

IV. That the defendant was informed and believed that the plaintiff intended to dispose of the same [among other goods] at the said intended sale by auction.

V. That the defendant accordingly prepared and published said "notice" for the purpose of warning all persons from purchasing the said goods and chattels so unlawfully detained by the plaintiff and in the *bona fide* belief that such warning was necessary for the protection of the defendant's own property, and without any malice towards the plaintiff.

CHAPTER CXV.

ANSWERS IN ACTIONS FOR NUISANCE.

2196. Denial of plaintiff's title.
2197. Denial of nuisance.
2198. Denial of building or maintaining dam.
2199. Admission of conducting business, but denial that the same is a nuisance.
2200. Prescriptive right to use water.
2201. License to maintain coal hole in sidewalk.

2196. Denial of plaintiff's title.

The defendant alleges that the plaintiff was not at the times alleged in the complaint the owner of [*or*, in possession of] the premises described in the complaint, as therein alleged.

2197. Denial of nuisance.

The defendant denies that he has at any time maintained or operated a slaughter-house [*or other business according to the charge*], upon his said premises, as alleged in the complaint herein, or that said premises have at any time been used by any one for the purpose of a slaughter-house [*or other business*].

2198. Denial of building or maintaining dam.

The defendant denies that he at any time erected or maintained the said dam, as in said complaint alleged.

2199. Admission of conducting business, but denial that the same is a nuisance.

The defendant admits that at the times named in said complaint, he has operated a planing mill [*or tannery, or otherwise according to the fact*], upon the premises named in the complaint, but defendant denies that the operation of said planing mill [*or other factory*] caused offensive or unusual noises, or volumes of dust [*or otherwise specifically negative the nuisance charged in the complaint*], as alleged in

said complaint, or that the same in any way interfered with the healthful enjoyment by the plaintiff or his said family of his said premises.

2200. Prescriptive right to use water.

The defendant alleges that at the times named in the complaint he was and still is the owner and in the possession of a certain mill and dam situated upon [*describing the premises*], and that for more than twenty years prior to the commencement of this action this defendant and his grantors have continuously and without interruption exercised the right of diverting the water of said river by said dam, and using said water for the operation of said mill, and have thereby acquired the right to so direct and use said water, and that the acts complained of by the plaintiff herein consist in such proper diversion and use of said water.

2201. License to maintain coal hole in sidewalk (adapted from Jennings v. Van Schaick, 108 N. Y. 530; 15 N. E. 424).

The defendant admits that he owned the premises described in the complaint in fee, and that he caused to be placed in the sidewalk in front of said dwelling house a coal hole, which was provided with a cover, and guards in strict accordance in all respects with the requirements of a license or permission duly granted to the defendant by the duly constituted municipal authorities of the city of ..... That the said coal hole, with its said cover and guards, was placed in said sidewalk by the defendant, in an absolutely safe condition, and in accordance with all the requirements of said license, and that said premises were thereupon and on or about ....., 19.., rented by the defendant to one X.... Y.... who thereupon took entire possession of said premises, and still retains the same, the defendant retaining no control or possession of the same. That defendant at no time had any notice or knowledge that the said coal hole was unsafe or out of repair, and the defendant alleges upon information and belief that if the said coal hole was at any time unsafe or out of repair, the same was due to the neglect and default of said [*tenant*], and not to any neglect or default on the part of this defendant.

CHAPTER CXVI.

DEFENSES IN ACTIONS OF TRESPASS.

2202. Denial of title and possession.
2203. The same as to part.
2204. Denial of trespass and taking.
2205. License.
2206. Prescriptive right by use for twenty years.
2207. Justification of trespass by reason of defective fence.
2208. Justification of rebuilding fence.
2209. Justification of breaking plaintiff's house by virtue of search-warrant.
2210. Justification of trespass to retake property.
2211. Justification on account of impassable highway.
2212. Justification of removal of eaves overhanging defendant's land.

2202. Denial of title and possession.

The defendant denies that at the times named in said complaint, the plaintiff owned or possessed the lands described in said complaint.

2203. The same as to part.

I. The defendant alleges that at the times named in the complaint herein the following described part of the lands named in the complaint was not owned or possessed by the plaintiff, but was [and still is] owned and possessed by this defendant, viz. [*description*].

II. That the defendant at no time entered on any part of the land described in the complaint, except that part thereof herein described.

2204. Denial of trespass and taking.

The defendant denies that at the times named in the complaint, or at any other time, he broke or entered upon the said premises of the plaintiff, or took or carried away the property alleged in the complaint, or any part thereof.

2205. License.

I. That on the .... day of ....., 19.. [and at various times between that day and the .... day of ....., 19..]

the plaintiff gave to this defendant license to enter [*etc., according to the fact*].

II. That under and in pursuance of said license of the plaintiff, the defendant did enter [*etc., state act of defendant, according to the fact*], which acts are the same of which the plaintiff complains.

2206. Prescriptive right by use for twenty years.

I. The defendant alleges that at the place where it is alleged in the complaint that the defendant had erected the dam complained of, there had been erected and maintained by the defendant [*or*, by one M.... N.... and by the defendant claiming under said M.... N....], for more than twenty years before the time of the alleged grievances, a mill-dam upon and across the said creek, of the same or greater height, which set back the waters upon and flowed the premises, alleged in the complaint to have been in the possession of the plaintiff, to the same or greater extent, and caused the same or greater obstruction to the flow of water from the said last-mentioned mill, as was caused or made by means of the said dam and obstruction of the defendant mentioned in the complaint.

II. That said dam, and the water-power created thereby, were, and had been, during all the time above mentioned, held and enjoyed by [said M.... N.... and] this defendant, claiming title thereto adverse to the plaintiff and all other persons; and were, during all said time, used for the propulsion of a mill and other machinery, without hindrance or molestation from the persons owning or occupying the mill and premises alleged in the complaint to have been in the possession of the plaintiff.

2207. Justification of trespass by reason of defective fence.

I. That the plaintiff and defendant occupy farms contiguous to each other, and separated by a fence which the plaintiff was bound to keep in repair.

II. That the plaintiff, and all other tenants or occupants of the plaintiff's farm, which is the same premises mentioned in the complaint, from a time whereof the memory of man is not to the contrary, have repaired and ought to repair

said fence; and the plaintiff, at and before the times mentioned in the complaint, ought to have repaired and maintained said fence so as to prevent the cattle of defendant on his farm from escaping onto the land of the plaintiff. [*Or where the obligation to maintain fence rests in agreement, it should be alleged accordingly.*]

III. That the plaintiff neglected to keep the fence in repair, by means whereof the cattle of the defendant escaped over the fence and onto the premises of the plaintiff; and thereby, and without the fault of the defendant, was committed the supposed injury in the complaint alleged.

IV. That the defendant, as soon as he had notice of the escape of the cattle, entered upon the plaintiff's premises to, and did, drive them out, doing no unnecessary damage; which are the acts of which the plaintiff complains.

2208. Justification of rebuilding fence.

I. That the fence mentioned in the complaint was a part of the division-fence upon the line between the lands of the plaintiff and of the defendant, which, by a previous agreement between them, the defendant was bound to make, and keep in repair.

II. That he took up and removed the part of said fence which he was so bound to repair, and replaced the same with a new fence upon the said division line, and with as little injury as possible to the plaintiff's crops, as he had full right to do; which are the acts complained of.

2209. Justification of breaking plaintiff's house by virtue of search-warrant.

I. That at the time mentioned in the complaint, one M.... N...., being a justice of the peace of the town of ..... in the county of ....., issued a warrant in writing under his hand and seal, directed to any constable of the said town, reciting, that whereas information on oath had been given to him, the said M.... N...., a justice of the peace as aforesaid, by one O.... P.... of .... that one hundred barrels of flour had lately been feloniously taken and carried away by Q.... R.... from the wharf, etc., of said O.... P...., and that the said one hundred barrels of flour, or a part thereof, were then concealed in a cellar of

S.... T...., situate at .....; and the said justice did, in and by the said warrant, in the name of the people of this state, command and authorize them, the said constables, or any of them, with proper assistance, in the daytime, to enter into the cellar of the said S..... T...., situate at ....., and there diligently search for the said flour; and if the same, or any part thereof, should be found, then the said constables were, in and by the said warrant, likewise commanded to bring the same so found, together with the said S.... T...., or the person in whose custody the same should be found, before him, the said justice, or some other justice of the peace of said town, etc., to be dealt with as the law directs.

II. That said warrant was delivered to Y.... Z...., one of the defendants, then being one of the constables of the said town, to be executed according to law, by virtue of which he went to the cellar of the said S.... T.... mentioned in the warrant, and which was part and parcel of, and belonging to, the dwelling-house mentioned in the complaint, and there finding the door thereof shut and fastened, did, in a friendly and peaceable manner, demand and require that the said door should be opened, which was then and there refused; and that thereupon the said Y.... Z...., one of the defendants, in order to execute the said warrant, did break open the said door, as it was lawful for him to do, doing as little damage as possible, and did search there for said flour, and took and carried away therefrom ninety-three barrels of flour, being part of the said one hundred barrels mentioned in the said warrant, and brought the same before the said justice, as he might lawfully do, which are the acts of which the plaintiff complains.

2210. Justification of trespass to retake property.

I. That on or about the .... day of ....., 19.., the plaintiff wrongfully took from the defendant's possession a horse [*or other property, describing the same*], which was then and still is the property of the defendant, and placed the same upon the plaintiff's said premises, and wrongfully refused to deliver the same to the defendant, though defendant frequently demanded the return thereof.

II. That thereupon this defendant entered upon the plaintiff's said premises, and retook said horse, and drove the same away, doing no unnecessary damage, which are the acts complained of in the plaintiff's said complaint.

2211. Justification on account of impassable highway.

I. That at the time alleged in the complaint there was a public highway adjoining plaintiff's said premises, which was then so miry and out of repair that it was impassable for vehicles and horses.

II. That the defendant at said time was lawfully attempting to pass over said highway with a vehicle and team of horses, and by reason of the said condition thereof was unable to do so, whereupon he took down a portion of plaintiff's fence and passed over a portion of plaintiff's premises around said foundrous portion of said highway, and returned to said highway as soon as he conveniently could, and did no unnecessary damage, which acts are the acts complained of by the plaintiff in his said complaint.

2212. Justification of removal of eaves overhanging defendant's land.

I. That at the time of the alleged trespasses set forth in the complaint the defendant owned and was in lawful possession of lands adjoining the said land of the plaintiff; that the plaintiff had built the dwelling-house described in the complaint next to the defendant's lands and so near to the north line thereof that the southerly eaves of the roof of said house extended over and overhung the land of the defendant; whereupon the defendant removed the same from his said land and placed the same upon the plaintiff's land doing no unnecessary damage in that behalf; and that said acts are the alleged trespasses complained of in the complaint.

CHAPTER CXVII.

DEFENSES IN ACTIONS OF EJECTMENT.

2213. Specific denial of title.
2214. Title in one defendant, the other being in possession under it.
2215. Equitable counter-claim for specific performance.
2216. That the land which plaintiff seeks to recover was sold by him to defendant, and by mistake not conveyed in the deed.
2217. Adverse possession, avoiding deed.
2218. Adverse possession by defendant and his grantor, under ten-year statute. (Wisconsin.)
2219. The same, claiming under a judgment.
2220. The same, where part only has been occupied.
2221. Adverse possession under twenty-year statute. (Wisconsin.)
2222. Answer with counter-claim for improvements. (Wisconsin.)
2223. Defense of special statute of limitations by original owner against tax title claimant. (Wisconsin.)

In ejectment the plaintiff must recover, if at all, on the strength of his own title, and under a general denial the defendant may prove any fact showing that plaintiff is not the owner, or is not entitled to the possession of the premises, except where defendant has ousted the plaintiff from actual and peaceable possession of the premises. If defendant depends on estoppel or an equitable title, it must be pleaded affirmatively.

2213. Specific denial of title.[1]

The defendant denies that the plaintiff at the time of the commencement of this action was the owner or entitled to the possession of the premises described in the complaint.

2214. Title in one defendant, the other being in possession under it.

I. That before the commencement of this action, that is

[1] This form may be used where title is alleged generally in the complaint; if the complaint set forth the chain of plaintiff's title the answer should specifically deny the particular allegation in the chain which is attacked.

to say, on the .... day of ....., 19.., the said defendant E.... F.... became and was lawfully seized in fee of, all and singular, the lands and premises in the said complaint described, with the appurtenances, and entitled unto and possessed of the same, in his sole and absolute right; and from thence, at all times, down to the time of the commencement of this action, have continued to be, and still continue to be, so seized in fee of every part and parcel thereof, and entitled unto and possessed of the same in their own sole and absolute right, and that the said other defendants [*naming them*], were, at the time of the commencement of this action, and still are, in the occupation of the said lands and premises, or of some part or parts thereof, under the said right, title, and possession of the said defendant E.... F....

II. Except as above admitted, the defendant denies each and every allegation in said complaint contained.

2215. Equitable counter-claim for specific performance.

I. [*Specific denial as in first form in this Chapter.*]

Second. By way of counter-claim, defendant alleges:

II. That on the .... day of ....., 19.., the plaintiff was the owner of said premises, and now has the legal title thereto; but on that day the plaintiff, by a contract in writing, of which a copy is annexed as a part of this answer, marked Exhibit A, sold, and agreed to convey, the same to the defendant on the terms therein specified, and put the defendant in possession thereof as purchaser.

III. That the defendant duly performed all the conditions thereof on his part, and on the .... day of ....., 19.., tendered to the plaintiff the sum of ..... dollars, being the full sum then due the plaintiff upon said contract with interest but plaintiff then refused to receive the same.

IV. That defendant has ever since remained and still is ready and willing to pay plaintiff said sum, but the plaintiff has at all times refused to receive the same; and this defendant now brings the said sum of ..... dollars into this court to be paid to the said plaintiff, if he will receive the same.

WHEREFORE [*demand for judgment as in action for specific performance.*]

2216. That the land which plaintiff seeks to recover was sold by him to defendant, and by mistake not conveyed in the deed.

I. [*Specific denial as in first form in this chapter.*]

Second. And by way of counter-claim the defendant alleges:

II. That on the .... day of ....., 19.., the plaintiff sold to defendant, and agreed to convey to him, the following described premises [*description of premises actually sold, including the premises demanded*].

III. That the defendant fully performed all the conditions thereof on his part, and the plaintiff executed and delivered to him a deed as and for a conveyance thereof, but which, by mistake in drawing the same, which mistake was then unknown to the parties to said deed, conveyed only the following described premises [*description*].

IV. That the defendant, supposing and believing said deed to be pursuant to the contract, and without negligence on his part, accepted it and took possession of the premises which he had agreed for, and still retains possession thereof.

V. That the premises mentioned in the complaint are a part of the premises designated in the contract, and the same which by said mistake was omitted to be included in said deed.

VI. That immediately upon discovering said mistake, to-wit, on or about the .... day of ....., 19.., the defendant applied to the plaintiff to correct the same by conveying said omitted part, which he refused to do.

WHEREFORE, the defendant asks judgment that the said deed be reformed by correcting said mistake in the boundaries, so that said deed shall express the true intent and meaning of the parties, and shall constitute a good and valid conveyance of the entire premises covered by said contract; that the said defendant be adjudged the true owner of the said premises described in the complaint, and that the title thereof be passed to and vested in this defendant, and for such other and further relief as may be just and equitable and for the costs and disbursements of this action.

2217. Adverse possession, avoiding deed.

I. That at the time of the delivery of the deed alleged

in the complaint [*or* the deed under which the plaintiff claims] the lands therein described were in the actual possession of one M.... N...., claiming under a title adverse to that of the grantor in said deed.

2218. Adverse possession by defendant and his grantor, under ten year statute (Wis. Stats. 1913 secs. 4211–4215).

I. [*Denial as in first form in this chapter.*]

And for a second and separate defense to this action, the defendant alleges:

II. That on the .... day of ....., 19.., one E.... F.... entered into possession of said premises described in the plaintiff's complaint, under claim of title, and exclusive of every and any other right, founding such claim upon * a written instrument, as being a conveyance of said premises, to-wit [a deed executed by G.... H.... to him] on the .... day of ....., 19.., duly witnessed and acknowledged, whereby the said G.... H.... granted and conveyed in fee simple to the said E.... F.... his heirs and assigns forever, the said premises, said deed containing the usual full covenants, which said deed was duly recorded in the office of the register of deeds for ..... county, on the .... day of ....., 19.., at .... o'clock in the .... noon, on page .... of volume .... of the record of deeds, and that thereafter and on the .... day of ....., 19.., said E.... F.... by deed duly conveyed said premises to this defendant.

III. That ever since said entry by the said E.... F...., and for more than ten years immediately preceding the commencement of this action, this defendant, as the purchaser and grantee of said premises from said E.... F...., and the said E.... F.... before him, have been in the actual, continued occupation and possession of said premises, adverse to, and exclusive of, every other right, under claim of title founded upon said deed to the said E.... F.... above described.

IV. That during the whole of said time, since said entry, the said premises [and the whole thereof] have been usually cultivated and improved [and have been protected by a substantial enclosure] [*or such other allegations as show a possession and occupation under the proper statute*].

2219. The same, claiming under a judgment.

I. [*Same as in last preceding form.*]

II. [*Same as in last preceding form to the * after which substitute as follows*]: a decree or judgment of the ..... court of ..... county, in an action wherein L.... M.... was plaintiff and N.... O..... was defendant, which judgment was duly rendered on the .... day of ....., 19.., and on said last-named day duly entered in the office of the clerk of said court, and by which judgment it was determined and adjudged [*here state the relief granted respecting the land in question*].

III and IV. [*Same as in last preceding form, but inserting the word* "judgment," *instead of* "deed."]

2220. The same, where part only has been occupied.

I and II. [*Same as in either of two preceding forms alleging, however, the entry in allegation II to have been upon a part of said premises, only.*]

III. That ever since said entry by the said E.... F.... and for more than ten years immediately preceding the commencement of this action, this defendant as the purchaser and grantee of said premises from the said E.... F...., and the said E.... F.... before him, have been in the actual, continued occupation and possession of a part of said premises adverse to and exclusive of every other right under claim of title founded upon said deed [*or* judgment] to the said E.... F...., above described, and that the part of said premises so adversely occupied is described as follows [*insert description*].

IV. [*Same is in last preceding forms.*]

2221. Adverse possession under twenty year statute (Wis. Stats. 1913 secs. 4207–4213).

I. [*Denial as in first form in this chapter.*]

II. And for a second and separate defense, the defendant alleges that neither the plaintiff above named, nor his ancestor, nor predecessor, nor grantor, was seized or possessed of the said premises described in said complaint, nor any part thereof, within twenty years before the commencement of this action.

III. That the defendant [his ancestors, predecessors, and grantors] have held the said premises and been in the actual continued occupation and possession thereof, and of the whole thereof, exclusive of every and any other right, for more than twenty years, immediately preceding the commencement of this action.

IV. That during the twenty years last before the commencement of this action, said premises and the whole thereof, have been protected by a substantial enclosure, and have been usually cultivated and improved [*or such other allegations of possession as are made necessary by the proper statute*].

2222. Answer with counter-claim for improvements (Wis. Stats. 1898 secs. 3096, 3097).[2]

I. [*Denial as in first form in this chapter.*]

II. [*Affirmative defense if any, as in preceding forms.*]

By way of counter-claim herein, the defendant alleges:

III. That he has been in possession of the premises, described in the complaint, since the .... day of ....., 19.., holding adversely to said plaintiff by title founded upon a written instrument, to-wit [*here describe the deed or instrument fully according to its legal effect*].

IV. That under said deed the defendant entered into exclusive possession of said premises, adversely asserting title thereto in good faith, founded upon said deed, and in the full belief that the said deed conveyed to him a good title;

[2] In Minnesota this defense should also state that defendant gave a valuable consideration for the land and the amount of such consideration, if defendant's claim be under an official deed, as well as the facts that such deed is regular on its face, and that defendant had no actual notice of any defects invalidating the same. Minn. Gen. Stats. 1913 sec. 7696 and 8070 *et seq.* In North and South Dakota an allegation should be added stating the value of the land aside from the improvements thereon. N. Dak. Rev. Codes 1905 sec. 7526, 7527; S. Dak. C. C. P. 1908 secs. 681, 682.

In the other states covered by this work the subject is governed by the following statutes: Ariz. R. S. 1913 sec. 695-708; Ark. Dig. of Stats. 1904 secs. 5056, 5058; Cal. C. C. P. 1906 secs. 322, 325, 741; Colo. Code Ann. 1911 secs. 4084-4093; Idaho Rev. Codes 1908 secs. 4039-4043, 4541; Mont. Rev. Codes 1907 secs. 6435-6439; Mo.R S. 1909 secs. 1879-1886; 2401; Okla. Comp. Laws 1909 sec. 6128 *et seq;* Tex. Civ. Stats. Ann. 1913 art. 5672 *et seq;* Utah Comp. Laws 1907 sec. 2860 *et seq;* Wash. Rem. and Bal. Code 1910 sec. 156; 786 *et seq;* Wyo. Comp. Stats. 1910 sec. 4971 *et seq.*

and still continues so to hold and possess said premises, claiming title thereto in good faith under said deed, and not otherwise.

V. That the defendant, while so in possession of said premises, holding adversely and asserting title in good faith, founded upon said deed, has made permanent and valuable improvements thereon, to-wit [*here state* particularly improvements made], said improvements are of the value of ..... dollars.

VI. That during the time last aforesaid the defendant has paid the taxes assessed in said premises for the years 19.. and 19.., and that the amounts so paid, and the dates of payment are as follows [*state amounts and dates*].

WHEREFORE defendant demands judgment that the complaint herein be dismissed with costs, or that if plaintiff be adjudged entitled to recover possession of said premises that the defendant's said claim for improvements and taxes paid be tried, and that he recover the same, as provided by law, and for such other judgment as may be just and equitable.

2223. Defense of special statute of limitations by original owner against tax title claimant (Wis. Stats. 1913 sec. 1187).

I. [*Denial as in first form in this chapter.*]

And for a second and separate defense the defendant alleges:

II. That the plaintiff claims title and right of possession of said premises under a certain pretended tax deed, by which said premises were pretended to be conveyed to him by the county of ..... for the non-payment of taxes thereon, which deed bears date, and was in fact executed on the .... day of ....., 19.., and recorded in the office of the register of deeds of said county of ..... on the .... day of ....., 19.., more than three years before the commencement of this action.

III. That the said plaintiff has not been in the actual possession of said premises described in the complaint, nor any part thereof, for three successive years during the five years next after the recording of such deed.

IV. That the defendant has been the owner of said premises ever since and for a long time prior to the execution of said deed under which the plaintiff claims, and he, the defendant, has been during all of such time in the [actual and] continued possession of said premises as such owner.

CHAPTER CXVIII.

DEFENSES IN ACTIONS AGAINST OFFICERS OR STOCKHOLDERS OF CORPORATIONS.

2224. Denial that defendant was an officer or stockholder of corporation.
2225. Denial of recovery of judgment against corporation.

2224. Denial that defendant was an officer or stockholder of corporation.

The defendant denies that at the times named in the complaint, or at any time since the .... day of ....., 19.., he was a director [*or* stockholder] in the [*name corporation*], or has in any way managed or taken part in the management of the affairs of said corporation.

2225. Denial of recovery of judgment against corporation.

The defendant alleges that he has no knowledge or information sufficient to form a belief that the plaintiff recovered against the company the judgment mentioned in the complaint; or that there existed any indebtedness of said company to said plaintiff for the amount of said alleged judgment, or any part thereof, or that an execution was issued on said judgment, or was returned unsatisfied, or that said judgment, or any part thereof, remains unsatisfied.

CHAPTER CXIX.

DEFENSES IN ACTIONS OF DIVORCE.

2226. General denial.
2227. Denial of adultery.
2228. Condonation.
2229. Counter-claim for divorce for plaintiff's adultery.
2230. Adultery committed with plaintiff's consent.

2226. General denial.

The defendant admits the marriage alleged in the complaint, and denies each and every other allegation of said complaint.

2227. Denial of adultery.

The defendant denies that at the time named in the complaint, or at any other time, he committed adultery with the person named in said complaint [*or* persons named in said complaint, or with either of them, or with any other person].

2228. Condonation.

I. The defendant alleges that after the times mentioned in the complaint, and before this action, the plaintiff being informed as to the matters therein alleged, freely condoned said alleged adultery, and forgave the defendant therefor [*and freely cohabited with him*].

II. That ever since such condonation the defendant has been a faithful husband to the plaintiff, and has constantly treated her with conjugal kindness.

2229. Counter-claim for divorce for plaintiff's adultery.

Second. For a second defense and a counter-claim the defendant alleges [*proceeding as in forms given in Chapter LXXVIII*].

WHEREFORE, the defendant demands judgment [*etc., as in said forms*].

2230. Adultery committed with plaintiff's consent.

That the act of adultery charged in the complaint, if committed at all, was committed with the knowledge, consent and procurement of the plaintiff.

CHAPTER CXX.

DEFENSES IN VARIOUS ACTIONS.

2231. Denial of execution in creditors' action.
2232. Denial of residence in creditors' action.
2233. That defendant has assets in creditors' action.
2234. Denial of possession of assets belonging to judgment debtor in creditor's action.
2235. Denial that conveyance was fraudulent in creditors' action.
2236. Denial of errors in account stated.
2237. Denial of payment or tender in action for specific performance.
2238. Denial of readiness to convey in action for specific performance.
2239. Denial of title in action for specific performance.
2240. Denial of mortgage, in mortgage foreclosure.
2241. Extension of time of payment, in mortgage foreclosure.
2242. Denial of having assumed mortgage in mortgage foreclosure.
2243. That defendant, having an equity of redemption in a part of the premises, is entitled to have the residue sold first, in mortgage foreclosure.
2244. Non-joinder of owner of equity of redemption, in mortgage foreclosure.
2245. Ratification by infant after coming of age.
2246. General answer of infant or lunatic, in foreclosure, partition, etc.
2247. By trustee, that he declines to act.
2248. The same, with denial of having acted.
2249. That defendant is a bona fide purchaser without notice of incumbrances.
2250. Disclaimer.
2251. That the term is not expired, in action to dissolve partnership.
2252. Overdrawing done by plaintiff's assent, in action to dissolve partnership.

2231. Denial of execution in creditors' action.

The defendant denies that any execution upon the said judgment was ever returned unsatisfied in whole or in part [*or* was ever issued to the said county] before this action.

2232. Denial of residence in creditors' action.

The defendant denies that he was, at the time mentioned in the complaint, a resident of the county to which execu-

tion is alleged to have been issued; and alleges that he was a resident of ..... county, to which no execution was issued before this action.

2233. That defendant has assets in creditors' action.

The defendant alleges that the defendant [*the judgment-debtor*] has, and at the commencement of this action had, real property [*or* personal property, *or both*], in the county of ..... in this state, liable to execution, and sufficient in value to satisfy said judgment, to-wit [*designating what*].

2234. Denial of possession of assets belonging to judgment-debtor in creditors' action.

The defendant denies that he had, at the commencement of this action, or had at any time since, property of the defendant [*debtor*] in his possession or under his control, as alleged.

2235. Denial that conveyance was fraudulent in creditors' action.

The defendant alleges that upon the making of the alleged assignment [*or* mortgage] there was an actual and continued change of the possession of the assigned [*or* mortgaged] property from the said [*debtor*] to the [*transferees*] who, immediately after the execution of the assignment [*or* mortgage] took actual and exclusive possession of the property; and that it has at all times since the assignment [*or* mortgage] remained in their exclusive possession and control.

2236. Denial of errors in account stated.

The defendant alleges that the account stated, which is mentioned in the complaint, is true and just [except as to *here specifying any admitted error*] and that there are no errors or mistakes in the stating of the said account, as alleged [except as aforesaid].

2237. Denial of payment or tender in action for specific performance.

The defendant denies that the plaintiff, at the time named in said complaint or at any other time, paid or ten-

dered to the defendant any part of [*or* said second instalment of] the said purchase-money agreed.

2238. Denial of readiness to convey in action for specific performance.

The defendant denies that the plaintiff was at any time ready and willing to convey the premises, as alleged; but [*here state refusal or inability, according to the fact, as it would be stated in an action for damages for the breach*].

2239. Denial of title in action for specific performance.

The defendant alleges that the plaintiff was not, and is not, owner in fee [*or otherwise, according to the complaint*] of the said premises, and could not, nor can he make to the defendant a good and sufficient title thereto, free and clear of incumbrances [*or otherwise, according to the complaint*]; but on the contrary [*setting forth incumbrances, if any*].

2240. Denial of mortgage, in mortgage foreclosure.

Defendant denies that he has knowledge or information sufficient to form a belief as to whether the defendant [*mortgagor*] ever executed the bond and mortgage described in the complaint, or whether the defendant [*mortgagee*] ever assigned said supposed bond and mortgage to the plaintiff, or whether he is now the lawful owner or holder thereof.

2241. Extension of time of payment, in mortgage foreclosure.

The defendant denies that any sum was due the plaintiff at the time of the commencement of this action or is now due upon the note and mortgage set forth in the complaint, and on the contrary thereof alleges that on the .... day of ....., 19.., the said plaintiff, for a valuable consideration to him paid by the defendant, contracted and agreed with the defendant that the time for the payment of the principal sum named in said note should be extended from [*date*] until [*date of extension*] which said agreement of extension is still in force.

2242. Denial of having assumed mortgage in mortgage foreclosure.

I. The defendant denies that the defendant [*mortgagor*] ever executed or delivered any deed or conveyance of the premises described in the complaint to this defendant [except as hereinafter admitted], or that this defendant ever accepted said supposed deed, or entered into possession of said premises, or ever in any manner whatever assumed or agreed to pay the mortgage set forth in the complaint.

II. The defendant alleges that the defendant [*mortgagor*] being indebted to this defendant in about the sum of ..... dollars executed at ..... and procured to be recorded in the month of ....., 19.., without the knowledge or assent of this defendant, a deed of the premises described in the complaint, which deed is recorded in book .... of conveyances, page ...., in the office of the ..... of the county of ..... That said deed never was delivered to this defendant, nor was any copy thereof, nor was it ever accepted by him, nor did he ever execute it, or agree or consent to it in any manner whatsoever, nor did he ever, in any manner, by said deed or otherwise, agree or assume to pay the incumbrances on said property, or any of them, nor was he cognizant of the terms, or character, or contents of said deed, until the .... day of ....., 19..; and that he then rejected and refused to accept said deed.

III. Defendant further says, that said deed was executed by said [*mortgagor*] to this defendant, as he is informed by said [*mortgagor*] and believes, for the purpose of securing said indebtedness of said [*mortgagor*] to this defendant; that there was no consideration whatsoever for the insertion in said deed, of the clause providing that this defendant assumed and agreed to pay the incumbrances therein specified, or that he took subject thereto; that said clause was inserted by mistake; that immediately upon this defendant's being cognizant of said deed, and before the commencement of this action, being on the .... day of ....., 19.., he procured from the defendant [*mortgagor*] and the defendant [*mortgagor*] executed to this defendant, under his hand and seal, a release, whereby he discharged and released him from any assumption of said mortgage, which said release was

duly recorded in book .... of Conveyances, page .... in the office of said ..... on the .... day of ....., 19..

2243. That defendant, having an equity of redemption in a part of the premises, is entitled to have the residue sold first, in mortgage foreclosure.

I. That after the making of the mortgage mentioned in the complaint, and which the plaintiff seeks to foreclose, said [*mortgagor*] conveyed to this defendant a part of the mortgaged premises for a valuable consideration, by deed bearing date on the .... day of ....., 19.., and recorded on the .... day of ....., 19.., in book .... of Conveyances, page ...., in the office of the ..... of the county of ..... which said portion of the mortgaged premises are described as follows [*copy of description*].

II. [That after the aforesaid conveyance, the said [*mortgagor*] conveyed the residue of said premises to the defendant W.... X....]

WHEREFORE the defendant demands that if a foreclosure be adjudged, all of said premises not so conveyed to this defendant be sold first; and that the premises so conveyed to this defendant be not sold, unless a sale thereof should be necessary to satisfy deficiency arising after the sale of such residue.

2244. Non-joinder of owner of equity of redemption, in mortgage foreclosure.

I. That after the making of the mortgage in the complaint described, and before this action, the defendant X...., being seized of the premises, by his deed under his hand and seal, dated on the .... day of ....., 19.., duly conveyed the same to one M.... N...., subject to said mortgage.

II. That said M.... N.... is still living at ....., and is now the owner of the equity of redemption in said premises.

2245. Ratification by infant after coming of age.

I. That said [*infant*] after the making of said deed, attained the age of twenty-one years.

II. That thereupon [*or afterwards*], and on or about the .... day of ....., 19.., and before this action, he assented

to, and ratified and confirmed the same, with full knowledge of the facts.

2246. General answer of infant or lunatic, in foreclosure, partition, etc.

This defendant, answering by his said guardian, says that he is a stranger to all and singular the matters and things in the complaint in this action set forth, and that he is an infant under the age of twenty-one years [*or*, a lunatic duly adjudged to be such by ..... on the .... day of ..... 19..] and claims such interest in the premises as he is entitled to; and he submits his rights and interests in the matters in question in this action to the protection of the court.

2247. By trustee, that he declines to act.

Admits that he declines to act in the trusts of said settlement, and is desirous of being discharged therefrom. Defendant further says, that he is ready to convey and release said trust-premises to the plaintiff, and to such new trustee as may be appointed by the court, on being indemnified in that behalf, and paid all his costs and expenses.

2248. The same, with denial of having acted.

I. The defendant, admitting that said [*testator*] left the will described in the complaint, says that he absolutely refused to accept or intermeddle with said trust, or in any way concern himself therein.

II. He further says that he never entered on said trust-estate, or received any of the rents and profits thereof.

III. That M.... N...., who has received said rents and profits, had no power or authority from this defendant to do so, and never accounted to this defendant therefor.

IV. That this defendant is desirous and ready to be discharged from said trust, and to do any act the court shall direct for that purpose, he being indemnified and having his costs.

2249. That defendant is a bona fide purchaser without notice of incumbrances.

I. That on the .... day of ....., 19.., M.... N.... was, or pretended to be, the owner in fee-simple of the lands

and premises described in the complaint, free from all incumbrances; and he then was in the actual possession thereof.

II. That the defendant, believing the said M.... N.... to be the owner of said premises, on that day agreed with him for the purchase thereof in fee-simple, for the price of ..... dollars; whereupon the said M.... N.... conveyed the said premises to this defendant, by his deed, dated on the .... day of ....., 19.., which deed contained a covenant on the part of said M.... N.... that he was absolutely seized of said premises, and that the same were free from all incumbrances.

III. That said sum of ..... dollars was actually paid by this defendant to said M.... N.... [at the time of the date of said deed].

IV. That this defendant had not, at or before the time of the said conveyance, or of the said payment of the purchase-money, any notice whatsoever, either express or implied, of the said mortgage now claimed by the plaintiff, or of any other incumbrance whatsoever that affected the said premises.

V. That at the time of said conveyance and payment the said mortgage had not been recorded in the office of the .... for the county of ..... [*being the county wherein said lands are situated*], nor was the same recorded until the .... day of ....., 19.. [*or*, nor has the same ever been recorded in said office].

2250. Disclaimer.

The defendant alleges that he disclaims all right, title, and claim to any estate of inheritance or of freehold in the premises described.

2251. That the term is not expired, in action to dissolve partnership.

Denies that the partnership between him and the plaintiff set forth in the complaint, was upon the terms, and according to the stipulations, agreements, and covenants alleged by plaintiff in his said complaint; but, on the contrary thereof, defendant alleges and states that said partnership was formed, and entered into, and carried on, under and in pursuance of a written agreement and articles of copartnership

between him and said plaintiff; a copy of which is hereto annexed, and forms part of this answer, showing that the time for the continuance of said copartnership is yet unexpired, which agreement has never been altered or varied in writing or by parol; and that the copartnership formed and carried on in pursuance thereof, is the same set forth and alleged in said complaint.

2252. Overdrawing done by plaintiff's assent, in action to dissolve partnership.

Denies each and every allegation set forth in the [third separate cause of action in] said complaint, relative to the alleged misconduct of defendant, and his alleged acts and doings in the management of the said partnership business, except the allegation of his drawing out from the funds of said copartnership more than his portion of the profits thereof, to-wit, the sum of ..... dollars—and investing the same in, etc., etc.; and as to such allegation, defendant alleges and states that it was done with the full knowledge of said plaintiff, and with his approbation and express assent.

CHAPTER CXXI.

COUNTER-CLAIMS; FORMAL PARTS.

2253. General form.
2254. Defenses and counter-claims, pleaded together.

2253. General form.

The defendant [*naming him, if he is one of several,* answering separately], by M.... N...., his attorney, answering the complaint herein, for a counter-claim [to the first cause of action] alleges:

That on the .... day of ....., 19.., and before the commencement of this action, the plaintiff became, and still is, indebted to this defendant upon an account [*etc., or otherwise, stating cause of action as if in a complaint*].

WHEREFORE, etc. [*demand for judgment as in a complaint*].

2254. Defenses and counter-claims, pleaded together.

The defendant [*naming him, if he is one of several, answering separately*], by M.... N.... his attorney, answering the complaint herein:

First. For a first defense thereto alleges, etc.

Second. For a second defense, said defendant alleges, etc., etc.

Third. For a counter-claim thereto, said defendant alleges [*here set forth cause of action as in a complaint*].

Fourth. For a second counter-claim thereto, said defendant alleges, etc.

WHEREFORE, etc. [*demand for judgment as in a complaint*].

CHAPTER CXXII.

REPLIES; FORMAL PARTS.

2255. General form. (Wisconsin.)
2256. The same; interposing both denial and new matter in defense. (Wisconsin.)
2257. Reply of statute of limitations. (Wisconsin.)
2258. Reply in states where new defensive matter must be replied to as well as counter-claims.
2259. The same, where answer contains both denials and new matter.
2260. The same, where answer contains both a defense and a counter-claim.

2255. General form (Wis. Stats. 1913 sec. 2661).

The plaintiff, replying to the counter-claim contained in the answer of the defendant [*or*, the first, *or other* counter-claim contained in the answer of the defendant], alleges [*or* denies, etc., *continuing as in an answer to a complaint*].

2256. The same; interposing both denial and new matter in defense (Wisconsin).

The plaintiff, replying to the answer of the defendant W.... X.... herein, as to the [first] counter-claim,

First. Denies each and every allegation of the answer respecting the same.

Second. For a second defense to said counter-claim the plaintiff alleges:

That at the time alleged in the complaint as the time of the making of the supposed note therein mentioned, this plaintiff was an infant under the age of twenty-one years, to-wit, of the age of .... years [*or stating other defense, as if in an answer to a complaint*].

2257. Reply of statute of limitations (Wisconsin).

The plaintiff alleges that the said cause of action, alleged for a counter-claim in said answer, did not accrue at any time within .... years next before the commencement of this action.

2258. Reply in states where new defensive matter must be replied to as well as counter-claims.[1]

The plaintiff, replying to the defendant's answer herein, denies each and every allegation therein contained.

[*The foregoing is to be used where the answer contains defensive matter only.*]

2259. The same, where answer contains both denials and new matter.

The plaintiff, replying to the defendant's answer [*or* to the first defense contained in the defendant's answer] herein, denies each and every allegation contained in the second paragraph of said answer [*or* defense, *or otherwise clearly specify the part of the answer containing new matter*] and alleges [*set forth new matter in avoidance, as in an answer.*]

2260. The same, where answer contains both a defense and a counter-claim.

The plaintiff, replying to the defendant's answer [*or*, to the first defense stated in the defendant's answer] herein,

I. Denies [*specify new matter in answer which is denied*].

[1] New matter set up in the answer must, in most of the states covered by this work, be met by a reply, in order to controvert the same; and such reply may, by way of controverting the answer, allege new matter; but such new matter cannot be inconsistent with, nor enlarge or alter the cause of action set up in the complaint. Ariz. R. S. 1913 secs. 424, 428; Colo. Code Ann. 1911 sec. 66; Iowa Ann. Code 1897 secs. 3576, 3577; Kans. Gen. Stats. 1909 sec. 5697; Minn. Gen. Stats. 1913 sec. 7760; Mont. Rev. Codes 1907 secs. 6560, 6561; Mo. R. S. 1909 sec. 1809; Neb. R. S. 1913 sec. 7680; Okla. Comp. Laws 1909 sec. 5642; Oregon Laws 1910 sec. 77; Utah Comp. Laws 1907 sec. 2980; Wash. Rem. amd Bal. Code 1910 sec. 277; Wyo. Comp. Stats. 1910 sec. 4399.

In North and South Dakota defensive matter in the answer is not required to be replied to, unless the court orders a reply to new matter in the answer constituting a defense by way of avoidance. N. Dak. Rev. Codes 1905 sec. 6863; S. Dak. C. C. P. 1908 sec. 130. In Wisconsin and Arkansas there is no reply except upon the allegation of a counter-claim. Wis. Stats. 1913 secs. 2658-2661; Ark. Dig. of Stats. 1904 sec. 6108. In California and Idaho the only pleadings allowed on the part of the plaintiff are, the complaint and the demurrer to the answer. Cal. C. C. P. 1906 sec. 422; Idaho Rev. Codes 1908 sec. 4162. In Texas it is not necessary for the plaintiff to deny any special matter of defense (other than counter-claim) pleaded by the defendant, but the same shall be regarded as denied unless expressly admitted.

II. Alleges that [*set forth new matter in avoidance as in an answer*].

As to the [first] counter-claim in said answer contained, the plaintiff, for a first defense,

I. Denies each and every allegation thereof [*or plead specific denial of particular facts*].

II. For a second defense to said counter-claim, alleges that [*here state new facts, as in an answer*].

PART IV

FORMS RELATING TO SUPPLEMENTAL PLEADINGS AND OTHER INTERMEDIATE PROCEEDINGS

CHAPTER CXXIII.

SUPPLEMENTAL PLEADINGS.

2261. General form of supplemental pleading.
2262. Supplemental complaint in a creditor's suit, seeking to set aside an assignment made subsequent to the original complaint, which alleged that defendants intended to assign with preferences, in violation of an agreement with the plaintiffs, and prayed an injunction.

The codes in some of the states provide that either party may be allowed, on terms, to make and serve a supplemental pleading alleging material facts occurring after the former pleading, or of which the party was ignorant when the former pleading was made.[1] But in the codes of most of the states covered by this work the right is confined to a statement of facts occurring after the making of the original pleading.[2] The supplemental pleading does not take the place of the former pleading, nor set up a distinct cause of action; it simply alleges certain additional facts germane to the original cause of action or defense.

2261. General form of supplemental pleading.

[*Title.*]

The plaintiff [*or* defendant] for a supplemental complaint [*or* answer] herein, pursuant to an order of this court, dated ....., 19.., alleges, etc.

[*Or, when the proposed supplemental complaint is served with the motion for leave*]:

[1] Wis. Stats. 1913 sec. 2687; Iowa Ann. Code 1897 sec. 3641; Mo. R. S. 1909 sec. 1854; N. Dak. Rev. Codes 1905 sec. 6887; S. Dak. C. C. P. 1908 sec. 154; Tex. Civ. Stats. Ann. 1913 art. 1824; Utah Comp. Laws 1907 sec. 2998.

[2] Ark. Dig. of Stats. 1904 sec. 6149; Cal. C. C. P. 1906 sec. 464; Colo. Code Ann. 1911 sec. 80; Idaho Rev. Codes 1908 sec. 4219; Kans. Gen. Stats. 1909 sec. 5738; Mont. Rev. Codes 1907 sec. 6583; Minn. Gen. Stats. 1913 sec. 7763; Nev. R. S. 1913 sec. 7716; Okla. Comp. Laws 1909 sec. 5684; Oregon Laws 1910 sec. 108; Wash. Rem. and Bal. Code 1910 sec. 308; Wyo. Comp. Stats. 1910 sec. 4442.

The plaintiff [*or* defendant] for a proposed supplemental complaint [*or* answer] herein, alleges, etc., etc.

2262. Supplemental complaint in a creditor's suit, seeking to set aside an assignment made subsequent to the original complaint, which alleged that defendants intended to assign with preferences, in violation of an agreement with the plaintiffs, and prayed an injunction.

[*Title of the cause, naming among the defendants the assignees now joined as parties*].

The plaintiffs, for a supplemental complaint herein [pursuant to an order of this court, dated ....., 19..] and on behalf of themselves, and all the other creditors of M.... N.... & Co., entitled under the original complaint to come in, and who may come in and contribute to the expenses of this suit, complain and allege:

I. That on the .... day of ....., 19.., they commenced their action in this court against the defendants [*naming the debtors*] by the service of a summons and copy of complaint, to which complaint the plaintiffs refer as if the same were herein repeated, and as part of this supplemental complaint.

II. That an injunction was granted, pursuant to the said complaint, restraining the said defendants from making any assignment or disposition of the property owned by the firm of M.... N.... & Co., in the month of ....., 19.., or the proceeds thereof. That at the time of service of the said summons and complaint, the said injunction was duly served on all the said defendants.

III. That after the service of the said injunction, the said defendants, in violation thereof, executed an assignment to the present defendants [*naming assignee*] of all the property of the firm of M.... N.... & Co., including a large amount of property owned by the said firm in the month of ....., 19.., and a large amount of the proceeds of other property, also belonging to the said firm in the said month.

IV. That, as the plaintiffs are informed and believe, the said [*assignees*] had notice of this action and of the said injunction at the time of the execution and delivery of the said assignment.

V. That, as the plaintiffs are informed and believe, the said assignment was upon some trust for the payment of creditors of the said firm, with certain preferences to a large amount to a part of their creditors, not including the plaintiffs, and in violation of the agreement alleged in the said original complaint; and the property thus assigned is not sufficient to pay the debts which the said firm owed in said month of ..... last, and still remaining unpaid.

VI. That the said [*debtors*] have recently, in the most public manner, stated that they owed, at the time of their failure in ..... last, three millions of dollars, two millions of which they claim to have satisfied; they also as openly state their losses in disposing of a portion of their stock of goods, and their store expenses, and expenses in making collections, at six hundred thousand dollars since their failure in ..... last, and the plaintiffs believe and insist that there has been an unwarrantable sacrifice of their best assets.

VII. That, as the plaintiffs are informed and believe, the said firm, and all the members thereof, were, in ..... last, when they obtained the extension mentioned in the original complaint, and have ever since been, largely insolvent.

VIII. That it was a condition of the said extension that all the creditors of the said firm should come into it, and the extension given by the plaintiffs was upon that condition; but in fact only about one-third of the creditors did come into it, and this fact was concealed from the plaintiffs; they received the extended notes on the faith of the extension having been agreed to by all the creditors.

IX. That if the said assignment is carried into effect, the plaintiffs will receive as their dividend not more than fifty per cent. of their demands, as they are informed and believe. The said [*assignees*] are not of sufficient pecuniary responsibility or business experience to be intrusted with so large an amount of property; the said O.... P.... was formerly a clerk of the said M.... N.... & Co., and the said Q.... N.... is a son of M.... N.... and, as the plaintiffs believe, will be entirely under the control and direction of said M.... N...., and the said assignment is merely a cover to enable the said M.... N.... to keep the property in his own possession.

WHEREFORE, the plaintiffs demand judgment as in the original complaint demanded, and that the said assignment be set aside, that the property assigned be delivered to a receiver, and distributed equally among all the creditors of M.... N.... & Co. who were such in ..... last; and that in the mean time the defendants be restrained by injunction from disposing of any of the said assigned property.

CHAPTER CXXIV.

ACCOUNTS AND BILLS OF PARTICULARS.

2263. Demand for copy of account.
2264. Affidavit for extension of time to plead, pending delivery of copy of account.
2265. Order extending time to plead, pending service of copy of account.
2266. Demand for copy of bill of particulars.
2267. Affidavit by defendant on which to base motion for bill of particulars.
2268. Order to furnish bill of particulars.
2269. Affidavit to obtain further bill of particulars.
2270. Order for further bill of particulars.
2271. Copy of account or bill of particulars to be furnished.
2272. Notice of motion to preclude party from giving evidence of account or bill of particulars.
2273. Order precluding plaintiff from giving evidence on trial.

In actions brought to recover upon accounts for goods sold or labor performed, the defendant may demand that a copy of the account be served upon him if it be not incorporated in or attached to the complaint.[1] In many of the states the statute expressly requires a copy of the account to be attached to and filed with the pleadings.[2] In Iowa and Nebraska, if the account be not attached the complaint is demurrable in Iowa, or subject to motion to compel the plaintiff to attach a copy to the complaint in Nebraska. Iowa Ann. Code 1897 sec. 3561; Bank v. Engelbrecht, 58 Neb. 639; 79 N. W. 556.

The statutes in the states first cited provide that "the court may order a further account or bill of particulars of

[1] Wis. Stats. 1913 sec. 2672; Ariz. R. S. 1913 sec. 421; Cal. C. C. P. 1906 sec. 454; Colo. Code Ann. 1911 sec. 69; Idaho Rev. Codes 1908 sec. 4209; Mont. Rev. Codes 1907 sec. 6569; Minn. Gen. Stats. 1913 sec. 7777; N. Dak. Rev. Codes 1905 sec. 6868; S. Dak. C. C. P. 1908 sec. 135; Oregon Laws 1910 sec. 84; Utah Comp. Laws 1907 sec. 2988; Wash. Rem. and Bal. Code 1910 sec. 284.

[2] Ark. Dig. of Stats. 1904 sec. 6128; Iowa Ann. Code 1897 sec. 3623, 3624; Kans. Gen. Stats. 1909 sec. 5713; Mo. R. S. 1909 sec. 1832; Neb. R. S. 1913 sec. 7692, 7697; Okla. Comp. Laws 1909 sec. 5658; Wyo. Comp. Stats. 1910 sec. 4405.

the claims of either party to be furnished," and by Rule XVI C. C. Rules Wis., the court may also grant such modification of the time for service of answer, demurrer or reply as the granting of the order may render necessary; but in Minnesota it is held that a bill of particulars may only be demanded in an action on account, and that in other actions the remedy is by motion to make the complaint more definite and certain. Comm'rs v. Am. Loan & T. Co., 75 Minn. 489; 78 N. W. 113.

With slight alterations the forms in this chapter may be readily adapted for use by the plaintiff in case he be entitled to demand a copy of the account or bill of particulars upon which defendant's counter-claim is based.

2263. Demand for copy of account.

[*Title.*]

SIR: You are hereby required to deliver to me, within ten days after service hereof on you, a copy [*or, if complaint be verified,* a verified copy] of the account alleged in the complaint in this action.

Dated....., 19..

G.... H....
Defendant's Attorney.

To E.... F....
Attorney for Plaintiff.

2264. Affidavit for extension of time to plead, pending delivery of copy of account.

[*Title.*]

[*Venue.*]

G.... H...., being first duly sworn, says that he is the attorney for the defendant in this action; that the same was commenced by the service of a summons and complaint, on the .... day of ....., 19.., and is brought to recover the sum of ..... dollars alleged to be due from the defendant to the plaintiff upon account for goods sold [*or otherwise state what action is brought for*]; that the items of said alleged account are not set forth in said complaint, and on the .... day of ....., 19.., this affiant served a written demand on the plaintiff's attorney, of which demand a copy is hereto annexed and made part hereof; that said account has not yet been served on this affiant; that the time

for answering the said complaint expires on the .... day of ....., 19.., and that the affiant is unable to prepare the answer to said complaint without said account; that the defendant has instructed this affiant to prepare an answer, and has expressed to affiant a purpose in good faith to defend the action, and from a statement of the case in this action made by the defendant to him, the affiant verily believes that the defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint, or to some part thereof.

G.... H....

[*Jurat.*]

2265. Order extending time to plead, pending service of copy of account.

[*Title.*]

On reading and filing the affidavit of L.... M.... hereto annexed, and the complaint in this action, and on motion of G.... H...., attorney for the defendant,

ORDERED that the time for answering the complaint herein be extended for .... days after the plaintiff shall have delivered to the defendant's attorney a copy of the account referred to in said complaint.

And meanwhile let all proceedings herein, on the part of the plaintiff, be stayed.

Dated ....., 19.. J.... K....

Circuit Judge.

[*or other proper officer.*]

2266. Demand for copy of bill of particulars.

[*Title.*]

SIR: You are hereby required to serve upon me within ten days a bill of particulars of the plaintiff's claim in this action, showing the names and amounts of the various articles of merchandise alleged to have been sold by the plaintiff to the defendant, with dates and prices thereof, and all payments or credits upon the same. [*Or*, the various items of damage which the plaintiff claims to have sustained by reason of the alleged wrongful acts of the defendant; *or*, the amount, nature and kind of services which the plaintiff claims, and the value of the same by items, with the date

when each item was rendered; *or*, the various breaches of the bond named in the complaint; *or*, the particular goods or property claimed to have been converted by the defendant, by items, with the date of the alleged conversion of each item and the value thereof; *or*, the particular sales which the plaintiff lost by reason of the defendant's alleged libelous statement, and the profits lost on each sale, with the names of the persons whose custom is alleged to have been lost, and the times when and places where such loss occurred.]

Dated ....., 19..

G.... H....

To E.... F.... Esq.,
Plaintiff's Attorney.

2267. Affidavit by defendant on which to base motion for bill of particulars.

[*Title.*]
[*Venue.*]

C.... D...., being first duly sworn, says that he is the defendant in this action.

That the complaint herein was served on the .... day of ....., 19..

That the cause of action therein stated is for [*here state what*] and is alleged in general terms, and fails to state the particulars of the plaintiff's claim.

That the defendant, on the .... day of ....., 19.., made demand in writing on the plaintiff that he deliver a bill of particulars of his claim; a copy of which demand is attached hereto and marked "Exhibit A;" that notwithstanding such demand no bill of particulars has been served on or furnished to the defendant.

That the defendant's purpose is to defend this action in good faith, and he is ignorant of the particulars of the plaintiff's claim.

That he has a valid defense to the whole of the plaintiff's said cause of action [*or*, to a part of the said plaintiff's cause of action, *specifying what part*]; that he has fully and fairly stated the case in this action to his counsel G.... H.... Esq., who resides at ..... and that upon the statement thus made he is advised by his counsel that he has a valid

and substantial defense to said action in whole [*or*, in part as aforesaid].

That it is necessary and material to his said defense that a bill of particulars of the plaintiff's said claim be rendered, as he is advised by his said counsel after such statement so made, and as he verily believes.

That no previous motion for service of such bill of particulars has been made, and that the time for answering said complaint will expire ....., 19.., and has not been extended.

That this affidavit is made for the purpose of moving for an order requiring the service of such bill of particulars, and for an extension of time in which to answer said complaint, with a stay of proceedings during such time.

C.... D....

[*Jurat.*]

2268. Order to furnish of particulars.

[*Title.*]

The defendant's motion for a bill of particulars of the plaintiff's claim coming on to be heard on the .... day of ....., 19.., and on reading the complaint, the affidavit of the [*defendant*] and [*here mention other papers used on hearing*], G.... H.... attorney for defendant, appearing for the motion, and E.... F.... for the plaintiff opposing, and after hearing and being advised in the premises,

ORDERED that within .... days after the service of this order on his attorney, the plaintiff deliver to the defendant's attorney a bill of particulars [duly verified], of the demand for which this action is brought, stating fully [*here specify what the bill shall specially state*], and—

That all proceedings herein, on the part of the plaintiff, be stayed, and that the defendant have .... days, after the service of such bill, in which to answer the complaint, and that he recover ten dollars, the costs of this motion.

Dated ....., 19..

J.... K....
Judge.

2269. Affidavit to obtain further bill of particulars.

[*Title.*]

[*Venue.*]

C.... D...., being first duly sworn, says that he is the defendant in this action, and that on the .... day of ....., 19.., the plaintiff, upon defendant's demand [*or*, upon an order so requiring] served on the defendant's attorney herein a copy of the account mentioned in his complaint [*or*, a bill of particulars of the plaintiff's demand on which this action is brought] which copy so served is hereto annexed.

That the same is so defective, indefinite and insufficient that the defendant is unable to answer the same [*or*, to go to trial thereon], in that it fails to state the dates of the several items of the account [*or otherwise specify the defects*] and that a further and more specific account [*or* bill of particulars] is absolutely necessary in order to enable the defendant to prepare his answer and prepare for trial for the following reasons [*here state reasons*].

C.... D....

2270. Order for further bill of particulars.

[*Jurat.*]

[*Title.*]

Upon the affidavit of C.... D...., and upon the complaint herein and upon [*name other papers if any, on which order is based*], and upon motion of G.... H...., Esq., defendant's attorney, E.... F...., Esq., plaintiff's attorney having appeared in opposition thereto.

ORDERED that the plaintiff's attorney deliver to the defendant's attorney, within .... days after service of this order, a further account in writing, of the particulars of the plaintiff's demand herein, specifying [*here point out particularly the defects to be supplied*].

Ordered further [*continue with order for stay, etc., as in last preceding order*].

2271. Copy of account or bill of particulars to be furnished.

[*Title.*]

To G.... H...., Esq.,
Defendant's Attorney.

TAKE NOTICE that the within is a true copy of the account mentioned in the complaint herein [*or*, a true bill of particulars of the plaintiff's demand in this action] as demanded by you.

Dated ....., 19..

E.... F....,
Plaintiff's Attorney.

[*If complaint be verified, attach verification to the account or bill, as follows*]:

[*Venue.*]

A.... B...., being first duly sworn, says that he is the plaintiff in the above entitled action, and that the foregoing is a correct account [*or*, bill of particulars] of the plaintiff's claim on which this action is brought, and that he verily believes it to be true.

A.... B....

[*Jurat.*]

2272. Notice of motion to preclude party from giving evidence of account or bill of particulars.

[*Title.*]

SIR: Please take notice that upon the complaint herein and the account and further account [*or*, bill of particulars and further bill of particulars] heretofore served herein, and upon the affidavit of L.... M...., a copy of which is hereto annexed and herewith served on you, the defendant, by his counsel, will move the court, at the next regular term thereof, at the court house in the .... of ....., in said county, at the opening of the court on the .... day of ....., 19.., or as soon thereafter as counsel can be heard, for an order herein that the plaintiff be precluded from giving evidence on the trial of this action, of the matters of which he has failed and refused to furnish a sufficient bill of particulars [*or*, account] to-wit [*here specify the matters sought to be precluded*], and for such other order or relief as the court may grant in the premises.

Dated ...., 19..

G.... H....,
Defendant's Attorney.

To E.... F.... Esq.,
Plaintiff's Attorney.

2273. Order precluding plaintiff from giving evidence on trial.

The motion of the defendant for an order precluding the plaintiff from giving evidence of certain matters therein specified, coming on to be heard at said term on the .... day of ....., 19..;

On reading and filing the affidavit of L.... M.... herein, and on the pleadings and [*here state other papers used in the motion*], and after hearing G.... H...., attorney for the [*defendant*] for the motion, and E.... F...., plaintiff's attorney in opposition, and being advised in the premises:

ORDERED that, upon the trial of this action, the plaintiff be precluded from giving evidence of, or in support of, the matters of which he has failed to furnish a [*further*] sufficient account [*or*, bill of particulars] as required herein, to-wit [*here specify the matters precluded*], and that the defendant have ten dollars, the costs of this motion.

By the Court:

L.... M...., Circuit Judge.

CHAPTER CXXV.

MOTIONS RESPECTING THE PLEADINGS.

2274. Notice of motion for extension of time to answer.
2275. Affidavit for extension of time to answer.
2276. Order extending time to plead.
2277. Notice of motion to make pleading more definite and certain.
2278. Order thereon.
2279. Notice of motion for leave to serve amended pleading, copy served with motion.
2280. Notice of motion for leave to amend, amended pleading not served.
2281. Order allowing amended pleading.
2282. Notice of amended pleading, when copy has not been served with the motion.
2283. Order giving leave to amend formal error.
2284. Notice of motion to amend complaint by striking out co-plaintiffs, and making them defendants.
2285. The same, by adding defendant.
2286. The same, by correcting fictitious name.
2287. Affidavit to obtain leave to correct fictitious name.
2288. Order thereon.
2289. Affidavit for leave to file supplemental complaint.
2290. The same, copy of supplemental pleading served with motion.
2291. Notice of motion for leave to file supplemental complaint.
2292. Order allowing supplemental complaint.
2293. Affidavit on application to file supplemental answer.
2294. Order granting leave to make a supplemental answer.
2295. Notice of motion to compel reply.
2296. Order thereon.
2297. Affidavit on motion to dismiss for failure to file complaint and pay state tax. (Wisconsin.)
2298. Certificate that summons is not filed, nor tax paid. (Wisconsin.)
2299. Order thereon. (Wisconsin.)
2300. Notice indorsed on pleading returned for irregularity.
2301. Notice of irregularity in respect to one of several persons pleading together.
2302. Notice of motion to require attorney to receive pleading.
2303. Order thereon.
2304. Notice of motion to strike out irrelevant, redundant or scandalous matter.
2305. Order thereon.
2306. Notice of motion to compel plaintiff to elect between several counts setting forth the same cause of action.
2307. Affidavit for same.
2308. Order requiring election.
2309. Notice of motion to strike out answer.
2310. Affidavit to falsity of answer.
2311. Corroborative affidavit.
2312. Order thereon.

2313. Notice of motion to strike out one defense as sham, and for judgment upon the other as frivolous.
2314. Notice of motion for judgment on frivolous pleading. (Wisconsin.)
2315. Order striking out an answer in part as frivolous and in part as irrelevant. (Wisconsin.)
2316. Order for judgment on frivolous pleading.
2317. The same, reserving leave to amend.
2318. Notice of motion by plaintiff for judgment on the pleadings.
2319. Notice of application for judgment for amount admitted by answer to be due. (Wisconsin.)
2320. Notice of motion that the defendant satisfy that part of the plaintiff's claim admitted to be just. (Wisconsin.)
2321. Order thereon.
2322. Notice of motion to strike answer from the files because not verified.

2274. Notice of motion for extension of time to answer.

[*Title.*]

TAKE NOTICE that on the affidavit of C.... D...., a copy of which is herewith served, and upon the complaint heretofore served and filed, the undersigned will move the court, at a special term thereof to be held at..... on the ....day of ....., 19.., at....o'clock in the forenoon, to enlarge the time to answer herein .... days, or for such other relief as may be just.

Dated....., 19..

G.... H....
Defendant's Attorney.

To E.... F...., Esq.,
Plaintiff's Attorney.

2275. Affidavit for extension of time to answer.

[*Title.*]
[*Venue.*]

C.... D...., being duly sworn, says:

I. That he is the defendant in the above entitled action, and intends in good faith to defend the same.

II. That he has fully and fairly stated the case in this cause to G.... H...., his counsel therein, who resides in the village of..... [*or*, at No....., ...street, in the city of .....], and that he has a good and substantial defense, on the merits, to the whole of said action, as he is advised by his

counsel, and verily believes. [*Or if the defense be to part only, state particularly what part*].

III. [*State excuse, e. g., thus*]: That he was compelled to leave the city of.....in which he resides, on business, immediately after being served with the summons herein, and remained absent for two weeks, since which he has not had time to instruct his counsel concerning his answer in this cause, and that....days further time is necessary therefor. That the complaint was served on the....day of....., 19.., and the time to answer expires on the....day of ....., 19.., and no extension of such time has been had [*or if any, state what*].

C.... D....,

[*Jurat.*]

2276. Order extending time to plead.

On the annexed affidavit of C.... D...., and upon the complaint herein,

ORDERED that the said defendant have....days additional time [*or* until the....day of....., 19..] to answer the complaint herein.

Dated....., 19.. L.... M....
Judge.

2277. Notice of motion to make pleading more definite and certain.

[*Title.*]

SIR: Please take notice that upon the [complaint] heretofore served in this action, the defendant, by his counsel, will move the court at the next regular term thereof, to be held at the court house, in the city of.....on the....day of .....19.., at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order requiring the complaint herein to be made more definite and certain in this respect, to-wit [*here state the respects in which greater definiteness and certainty are deemed necessary*].

Dated....., 19.. G.... H....,
Defendant's Attorney.

2278. Order thereon.

[*Title.*]

The motion of the defendant for an order requiring the complaint herein to be made more definite and certain coming on to be heard before the court on the....day of ....., 19..;

Upon the complaint herein, and on motion of G.... H...., Esq., attorney for the defendant,

ORDERED, that the plaintiff make his complaint herein definite and certain by amendment, by showing [*here state the respects in which it is to be amended*], and that within ....days after the service of this order on his attorney, he serve on the defendant's attorney a copy of the complaint as amended, and pay ten dollars, the costs of this motion.

By the Court:
J.... K...., Circuit Judge.

2279. Notice of motion for leave to serve amended pleading, copy served with motion.

[*Title.*]

TAKE NOTICE that upon the affidavit of C.... D...., and proposed amended answer [*or other pleading*] copies of which are herewith served, and upon the pleadings served in this action, the undersigned will move the court, at a special term to be held at.....in the city of.....on the....day of.....next, at....o'clock in the....noon, for leave to file and serve such amended answer [*or other pleading*] in this action, and for such other and further order as may be just.

[*Date.*]

G.... H....,
Defendant's Attorney.

[*Address.*]

[*The affidavit on which the motion is based should set forth the facts which are relied upon to serve to excuse the defect and justify the application for leave to amend.*]

2280. Notice of motion for leave to amend, amended pleading not served.

[*Title of the cause.*]

TAKE NOTICE that on the affidavit of C.... D...., herewith served, and on all the pleadings and proceedings in

this action, the undersigned will move the court, at a special term thereof to be held at.....on the....day of....., 19.., at....o'clock in the....noon, * for leave to amend his answer [*or other pleading*] herein, by the insertion of the following clause in place of the fifth paragraph thereof [*or otherwise indicate the nature of the amendment sought to be made*], or for such other or further relief as may be just.

[*Date.*]

G.... H....,
Defendant's Attorney.

[*Address.*]

[*The better practice is to draw the proposed pleading and serve same with the motion, as indicated in the last preceding form.*]

2281. Order allowing amended pleading.

[*Title.*] [*At a special term, etc.*]

On reading and filing the affidavit of C.... D.... [and upon the proposed answer heretofore served, and upon the pleadings herein], and on motion of G.... H.... for plaintiff, after hearing E.... F.... [*or*, no one appearing] in opposition:

ORDERED, that the defendant have leave to * serve an answer in this action, amended by substituting, for the fifth paragraph of the original answer, the words ".... ....," within ....days from the date of this order, on payment of .....dollars costs to the plaintiff [and that plaintiff have leave to demur thereto within the usual time].

[*Or in case proposed amended pleading has been served with the motion*]: ORDERED, that the defendant have leave to amend his original answer by substituting therefor the proposed amended answer already served, and that the service of said amended answer already made stand as due service thereof, upon payment of.....dollars, motion costs, and that the plaintiff have leave to demur or plead thereto on or before....., 19..

2282. Notice of amended pleading, when copy has not been served with the motion.

Please take notice, that the within is a copy of the amended

complaint [*or* answer, *or* reply] in this action.

[*Date.*] [*Signature.*]

[*Address.*]

2283. Order giving leave to amend formal error.

[*As in Form 2281 to the *, continuing*]: amend his answer on file in this action, by inserting [*or* canceling] the word [*designating the error*] after the word "...." in folio....

2284. Notice of motion to amend complaint by striking out co-plaintiff's, and making them defendants.

[*As in Form 2280 to the *, continuing*]: that the plaintiffs may be at liberty to amend their complaint by striking out the names of A.... B.... and C.... D.... as plaintiffs, and making them defendants, without costs as to the other defendants and for such other relief as may be just.

[*Date.*] [*Signature.*]

[*Address.*]

2285. The same, by adding defendant.

[*As in Form 2280, to the *, continuing*]: that the plaintiff may have leave to amend his summons and complaint in this action by adding W.... X.... as a defendant therein, with apt words to charge him; and for such other relief as may be just.

[*Date.*] [*Signature.*]

[*Address.*]

2286. The same, by correcting fictitious name.

[*As in Form 2280 to the *, continuing*]: that the plaintiff have leave to substitute the name of....as the real name of the defendant in this action, wherever the name Richard Roe occurs in the papers filed in this action; or for such other relief as may be just.

[*Date.*] [*Signature.*]

[*Address.*]

2287. Affidavit to obtain leave to correct fictitious name.

[*Title.*]

[*Venue.*]

A.... B...., being duly sworn, says:

I. That he is the plaintiff in this action:

II. That he was not acquainted with the real name of the defendant in this action until after the commencement of this action, and [about one week ago].

III. That the defendant's real name is E.... F.... and not C.... D....

A.... B....

[*Jurat.*]

2288. Order thereon.

[*Commencement as in Form 2281*].

ORDERED that the name of E.... F.... be substituted in place of that of C.... D.... as the real name of the defendant in this action.

2289. Affidavit for leave to file supplemental complaint.

[*Title.*]

[*Venue.*]

A.... B...., being first duly sworn says that he is the plaintiff in the above entitled action, which was commenced on the ....day of....., 19.., and is brought for the purpose of [*here state the general object of action*], and that issue has been joined therein [*and is now on the calendar and noticed for trial at the present term*].

That it becomes necessary for defendant to file and serve a supplemental complaint in this action, for the following reasons, to-wit [*here state facts showing necessity*].

That the plaintiff was ignorant of said facts when his former complaint was made.

Or, that said facts have occurred since his former complaint herein was made.

A.... B....

[*Jurat.*]

2290. The same, copy of supplemental pleading served with motion.

[*Title.*]

[*Venue.*]

A.... B...., being duly sworn, says:

I. That he is the plaintiff above named; that this action

was commenced in this court by the service of a summons and complaint on the....day of....., 19..; that the action is brought for the purpose of [*state briefly the object of the suit*, as, the foreclosure of a certain mortgage, particularly described in the complaint herein]; that issue has been joined herein, and the cause is now upon the calendar of this court, awaiting trial.

II. Deponent further says, that he has read the annexed draft of the proposed supplemental complaint, and the facts therein stated are true, to the best of deponent's knowledge and belief. That said facts did not occur [*or*, did not come to the knowledge of this deponent, nor had he any information thereof] until after the service of the original complaint herein.

A.... B....

[*Jurat.*]

2291. Notice of motion for leave to file supplemental complaint.

[*Title.*]

TAKE NOTICE, that upon the affidavit of A.... B.... [and copy of the proposed supplemental complaint] herewith served, and upon all the pleadings and proceedings in this action, the undersigned will move the court, at a special term to be held at.....on the....day of....., 19.., for leave to file and serve such supplemental complaint in this action [*or*, to serve a supplemental complaint setting up the matters contained in the annexed affidavit]; or for such other relief as may be just.

[*Date.*]

E.... F....,
Plaintiff's Attorney.

[*Address.*]

2292. Order allowing supplemental complaint.

[*Title.*] [*At a special term, etc.*]

On reading and filing [*describe motion-papers*], and on motion of E.... F.... for the plaintiff, and after hearing G.... H.... [*or*, no one appearing] in opposition:

ORDERED, that the plaintiff have leave to serve, within ....days after this date, a copy of the supplemental com-

plaint filed upon this motion, on payment to the [defendant] .....dollars costs.

[*Or*, ordered, that the plaintiff have leave to make and file the proposed supplemental complaint herein upon payment of .....dollars costs of motion to the defendant, and further that upon such payment being made, the service of said supplemental complaint heretofore made stand as the completed service thereof, and that the defendant have time to plead to said supplemental complaint until and including ....., 19..]

2293. Affidavit on application to file supplemental answer.

[*Title.*]

[*Venue.*]

C.... D...., defendant above named, being duly sworn, says:

I. That this action was commenced on the....day of ....., 19..; that issue was joined therein by the service of this defendant's answer on the....day of....., 19.., and this cause is now pending upon the calendar of this court, awaiting trial.

II. Deponent further says, that this action is brought upon a promissory note alleged to have been made by him, and to be held and owned by the plaintiff. That since the joining of the issue, viz., on the....day of....., 19.., this defendant paid to the plaintiff the sum of.....dollars in full payment of the note mentioned in the complaint, and of the costs up to that day, accrued therein. [*Or otherwise state new facts.*]

2294. Order granting leave to make a supplemental answer.

[*Title.*] [*At a special term, etc.*]

[*Recitals as in Form 2292.*]

ORDERED, that the defendant be allowed to make a supplemental answer herein, setting up payment of the note in suit [*or*, as proposed by him], upon payment to the plaintiff of.....dollars motion costs; such answer [*or* complaint]

to be served upon the attorney for the plaintiff [*or* defendant] within....days from the entry of this order [the issue to stand as of the....day of....., 19..]

[*Or provide that supplemental answer already served stand without further service as in Form 2292, in case of supplemental complaint.*]

2295. Notice of motion to compel reply.

[*Title.*]

Please take notice that upon the pleadings in this action the undersigned will move the court, at a special term thereof to be held at.....on the ....day of....., 19.., at .... o'clock in the forenoon, or as soon thereafter as counsel may be heard, to require a reply to the new matter by way of avoidance, set up in the answer in this action, or for such other relief as may be just.

[*Date.*]

G.... H....,
Defendant's Attorney.

[*Address.*]

[*This and following form to be used in North and South Dakota when such matter is to be replied to only when directed by the court. N. Dak. Rev. Codes 1905 sec. 6863; S. Dak. C. C. P. 1908 sec. 130.*]

2296. Order thereon.

[*Title of cause.*] [*As a special term, etc.*]

On reading and filing the pleadings herein, and notice of this motion [and proof of due service], and on motion of G.... H...., for the defendant, after hearing E.... F.... [*or*, no one appearing] in opposition:

ORDERED, that the plaintiff reply to the new matter by way of avoidance, contained in the answer herein, within twenty days from service of a copy of this order.

2297. Affidavit on motion to dismiss for failure to file complaint and pay state tax (Wis. Stats. 1913, sec. 2632).[1]

[*Title.*]

[*Venue.*]

G.... H...., the defendant's attorney, being duly sworn, says that the summons was served in this action on the....

day of....., 19.., and that defendant's answer [*or* demurrer] thereto was served on the....day of....., 19.., and that said summons has not been filed in said county, nor the state tax on the action paid, as appears by the annexed certificate of the clerk thereof.

G.... H....

[*Jurat.*]

2298. Certificate that summons is not filed, nor tax paid (Wisconsin).

[*Title.*]

I, M.... N...., clerk of the.....court, do hereby certify that the summons in the above entitled action has not been filed in my office at this date, nor has the state tax on said action been paid.

[*Date.*] L.... M....,
Clerk of.....Court.

2299. Order thereon (Wisconsin).

[*Title.*]

It appearing to my satisfaction that the summons in this action has not been filed, nor the state tax on said action been paid, and that more than ten days has elasped since the service of the answer [*or* demurrer] to the complaint herein:

ORDERED, that this action be dismissed unless the plaintiff shall pay said state tax, together with five dollars costs of motion to the defendant on or before ....., 19..

By the Court:

N.... O...., Judge.

2300. Notice indorsed on pleading returned for irregularity.

Please take notice that the within answer is returned as defective and irregular, in this, that it is not folioed, nor

[1] This provision is peculiar to Wisconsin In some states it is required that the petition or complaint be filed within a certain time, or by a certain day of the term; in such states this and the following forms may be used with such changes as are necessary to bring the case within the statute of the particular state. Minn. Gen. Stats. 1913 sec. 7747; district court rule XVI; Iowa Ann. Code 1905 sec. 3515.

fairly and legibly written, and that separate defenses are not separately stated, nor plainly numbered; nor do they refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished [*or otherwise state the irregularity.*]

[*Date.*] [*Signature.*]

[*Address.*]

2301. Notice of irregularity in respect to one of several persons pleading together.

[*Title.*]

Please take notice that I object to the answer this day served on me, as defective and irregular on the part of the defendant W.... X...., in this, that it is not verified on his part; and I refuse to receive it as his answer.

2302. Notice of motion to require attorney to receive pleading.

[*Title.*]

Please take notice that on the affidavits annexed, and on the pleadings in this action, the undersigned will move the court, at a special term to be held at..... on the....day of ....., 19.., etc., to require the plaintiff to receive the answer heretofore served upon his attorney, or that upon his refusal to receive the same, such answer may stand as the answer in the cause, and as duly served on the....day of ....., 19..; or for such other relief as may be just, with the costs of this motion.

[*Date.*]

[*Address.*] [*Signature.*]

2303. Order thereon.

[*Title.*] [*At a special term, etc.*]

On reading and filing [*motion papers*], and upon motion of G.... H...., defendant's attorney, after hearing E.... F...., plaintiff's attorney in opposition:

ORDERED, that the plaintiff receive the answer heretofore served upon him in this action, if served anew, together with a copy of this order [within....days after the date of

this order]; or that, upon his refusal so to do, such answer stand as the answer in the cause, and as duly served on the ....day of....., 19..

2304. Notice of motion to strike out irrelevant, redundant or scandalous matter.

[*Title.*]

Take notice that upon the pleadings in this action [and the affidavit of C.... D.... herewith served], the undersigned will move the court, at a special term to be held at ..... on the....day of....., 19.., at....o'clock in the ....noon, or as soon thereafter as counsel can be heard,* to strike out all of the third paragraph of the complaint [*or*, answer] herein, and so much of the fifth paragraph as is contained between the word "...." and the word "...." [*or* so much thereof as is contained between the word "...." in folio...., and the word "....," in folio ....], both inclusive, as irrelevant and redundant [*or* as scandalous], and for such other relief as may be just [with costs].

[*Date.*] [*Signature.*]

[*Address.*]

2305. Order thereon.

[*Title.*] [*At a special term, etc.*]

On reading and filing [*describe motion papers*] and on motion of G.... H.... for the [defendant], and after hearing E.... F.... in opposition thereto [*or*, and on proof of due service of notice of the motion, and no one appearing in opposition thereto]:

ORDERED, that the matter contained in the [complaint] in this action, from the word "and," in folio ten thereof, to the word "plaintiff," in folio twenty-one, be stricken out as redundant [*or* irrelevant]; and that as to the matter contained in the second paragraph, said motion be denied, and that the defendant have.....dollars costs of this motion.

2306. Notice of motion to compel plaintiff to elect between several counts setting forth the same cause of action.

[*Title.*]

Please take notice that upon the summons and complaint in this action [and on an affidavit, of which a copy is herewith served], the undersigned will move the court, at a special term to be held at.....on the....day of....., 19.., at ....o'clock in the....noon, or as soon thereafter as counsel can be heard, that the plaintiff be required to elect between the first stated cause of action and the second stated cause of action in the complaint, and state which he will rely on; and that on such election the other be stricken out; or in default of so electing, then that the second stated cause of action be stricken out as redundant; and for such other or further relief as may be just [and for the costs of this motion].

[*Date.*] [*Signature.*]

[*Address.*]

2307. Affidavit for same.

[*Title of the cause.*]

[*Venue.*]

C.... D...., being duly sworn, says:

I. That he is the defendant in the above entitled action. [*Or if otherwise, show in some way deponent's knowledge of the circumstances involved.*]

II. That the plaintiff's complaint herein purports to set forth two causes of action, but that only one transaction of the nature mentioned in either of the supposed causes of action set up in the complaint ever occurred between the defendant and the plaintiff, and that the transactions mentioned in both of the said supposed causes of action are in reality one and the same.

C.... D....

[*Jurat.*]

2308. Order requiring election.

[*Title.*]

The motion of the defendant that the plaintiff be required to elect as to which cause of action alleged in his complaint

he will rely upon on the trial, coming on to be heard on the ....day of....., 19..; and on reading the complaint and the affidavit of C.... D...., now filed herein, and after hearing G.... H.... for the motion, and E.... F.... opposing, and being advised in the premises:

ORDERED, that the plaintiff be required to elect, within ....days after service of a copy of this order on his attorney, upon which of the several causes of action stated in his complaint he will rely on the trial, and that he make such election by written notice served upon the defendant's attorney.

That if plaintiff fails to so elect, the *second* and *third* causes of action be stricken out as redundant and irrelevant.

That defendant have.....dollars, his costs of this motion.

By the Court:

J.... K...., Judge.

2309. Notice of motion to strike out answer.

[*Title of cause.*]

Take notice that on the affidavit herewith served, and on the pleadings in this action, the undersigned will move the court, at a special term to be held at.....on the....day of....., 19.., at....o'clock in the....noon, or as soon thereafter as counsel can be heard, to strike out the answer herein as sham [*or*, the first defense in the answer herein as sham, and the second defense as irrelevant]; or for such other relief as may be just [with costs].

[*Date.*]

[*Address.*]

E.... F....,
Plaintiff's Attorney.

2310. Affidavit to falsity of answer.

[*Title of the cause.*]

[*Venue.*]

A.... B...., being duly sworn, says:

I. That he is the plaintiff in the above entitled action.

II. That he has read the answer of the defendant Y.... Z.... herein, and that the defense of payment therein set up is wholly and absolutely false; that the defendant has never paid, or in any way satisfied, the demand set up in the

complaint, nor any part thereof; nor has he ever paid, by himself or his agents, to the plaintiff, or to any of his agents, any part of the sum alleged by the said answer to have been paid.

III. That the only person ever employed by deponent to ask or receive money from the defendant is one E.... F...., whose affidavit is hereto annexed; and that, to the best of deponent's knowledge and belief, no other person ever asked or received anything from the defendant for account of this deponent.

[*Or* That the statements of said answer that [*here give them*] are utterly and absolutely false, and that said answer is a sham answer; and, on the contrary of said statements, the affiant alleges [*here contradict the sham matter set up*].

A.... B....

[*Jurat.*]

[*It will be wise to have corroborative affidavits.*]

2311. Corroborative affidavit.

[*Title of the cause.*]

[*Venue.*]

E.... F...., being duly sworn, says:

I. That he is a clerk in the employment of the plaintiff, and attends to the collection of the debts due to the latter.

II. That he has frequently asked the defendant for payment of the amount demanded by the complaint in this action, and the defendant has always refused to pay the same, and never has paid any part thereof to deponent; nor, so far as deponent is informed and believes, to any other person.

E.... F....

[*Jurat.*]

2312. Order thereon.

[*Recitals as in Form 2305.*]

ORDERED, that the answer of the defendant C.... D.... in this action be stricken out as sham, with..... dollars costs to plaintiff.

2313. Notice of motion to strike out one defense as sham, and for judgment upon the other as frivolous.

[*As in Form 2304 to the *, continuing*]: That the first defense in the answer herein be struck out as sham or irrelevant, and that the second defense be overruled as frivolous, and that judgment be given for the plaintiff thereon; or for such [*etc., concluding as in Form 2304*].

2314. Notice of motion for judgment on frivolous pleading (Wis. Stats. 1913 sec. 2681).

[*Title.*]

SIR: Please take notice that upon the pleadings heretofore served herein, the plaintiff will move the.....court, at the next regular term thereof, to be held in the.....of ....., on the day of....., 19.., at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order striking out the answer of the defendant herein, as sham, frivolous and irrelevant, and for judgment or such other or further order or relief as the court may grant.

[*Date.*] E.... F....,

[*Address.*] Plaintiff's Attorney.

2315. Order striking out an answer in part as frivolous and in part as irrelevant (Wis. Stats. 1913 sec. 2684).

[*Title.*]

[*Recitals as in Form 2305.*]

ORDERED, that the matter in the answer of the defendant herein alleged as a first defense be stricken out as frivolous, and that the following matter alleged in the second defense in said answer be stricken out as irrelevant [*here specify the matter to be stricken out, with particularity*], [and that the defendant, within....days after the service of this order on his attorney, serve an amended answer, omitting therefrom the matter hereby stricken out] and that he pay .....dollars, the costs of this motion.

By the Court:

J.... K...., Circuit Judge.

2316. Order for judgment on frivolous pleading.

On reading and filing the pleadings in this action, and notice of this motion [and proof of due service thereof], and on motion of G.... H.... for the plaintiff, and after hearing E.... F.... [*or*, no one appearing] in opposition thereto:

ORDERED, that the answer [*or* demurrer] of the defendant Y.... Z.... herein be stricken out as frivolous; * and that the plaintiff have judgment thereon for the relief demanded in the complaint, with costs of this action, and .....dollars costs of this motion.

2317. The same, reserving leave to amend.

[*As in preceding form to the* *, *continuing*]: with leave to the defendant to answer [anew] within....days after service of this order upon [*state terms*]; and that if he fail to do so, that the plaintiff have judgment thereon for the relief demanded in the complaint, with costs of this action, and .....dollars costs of this motion.

2318. Notice of motion by plaintiff for judgment on the pleadings.

[*Title.*]

SIR: Please take notice that upon the complaint and answer in this action, the undersigned will move the court at the next regular [*or* special] term thereof, to be held at the court house in the.....of....., county of....., on the....day of....., 19.., at the opening of court on that day, or as soon thereafter as counsel can be heard, for the judgment demanded in the complaint, and such other order or relief as the court may grant.

[*Date.*] E.... F....,
[*Address.*] Plaintiff's Attorney.

2319. Notice of application for judgment for amount admitted by answer to be due (Wis. Stats. 1913 sec. 2892).

[*Title of action.*]

SIR: Please take notice that on the complaint and answer herein the undersigned will, on the....day of....., 19.., at....o'clock in the....noon, apply to the clerk of said

court, at his office, in the city of....., in said county, to enter judgment for the plaintiff herein, for the amount which is admitted by the answer to be due, to-wit, the sum of .....dollars [*or*, for the amount claimed in the complaint, after deducting the amount of the defendant's counter-claim *or* set-off], to-wit, the sum of.....dollars.

[*Date.*]

E.... F....,
Attorney for Plaintiff,
....., Wis.

To G.... H...., Esq.,
Attorney for Defendant.

2320. Notice of motion that the defendant satisfy that part of the plaintiff's claim admitted to be just (Wis. Stats. 1913 sec. 2892).

[*Title.*]

SIR: Please take notice that upon the complaint and answer heretofore served herein, the undersigned will move the court at the next regular [*or* special] term thereof, at the court house in the....of....., in.....county, on the ....day of....., 19.., at....o'clock in the....noon, or as soon thereafter as counsel can be heard, for an order requiring the defendant to satisfy that part of the claim of the plaintiff admitted by the defendant in his answer to be just, to-wit, [*here specify the part admitted*]; and for such other order or relief as may be properly granted.

[*Date.*]

E.... F....,
Plaintiff's Attorney,
....., Wis.

To G.... H...., Esq.,
Defendant's Attorney.

2321. Order thereon.

[*Recitals as in Form 2305.*]

On motion of O.... P...., plaintiff's attorney:

ORDERED, that the defendant herein satisfy that part of the plaintiff's claim which he admits by his answer to be just, by [paying to the plaintiff, within....days after the service of this order, the sum of.....dollars].

By the Court:

J.... K...., Judge.

2322. Notice of motion to strike answer from the files because not verified.

[*Title.*]

To C.... D...., defendant above named and to E.... F...., his attorney.

TAKE NOTICE that the plaintiff above named will on ....the....day of....., 19.., at the court house in .....at the hour of....o'clock A. M., or as soon thereafter as counsel can be heard, move the court to strike from the files herein the answer filed by you on the ground that said answer is not verified [*or*, defectively verified in this *specifying clearly the defect*]. Said motion will be based upon the said answer and upon the pleadings and papers filed in the action.

[*Date.*]

L.... M....,
Plaintiff's Attorney.

CHAPTER CXXVI.

REVIVAL OR CONTINUANCE OF ACTIONS.

2323. Notice of motion on death or disability of plaintiff.
2324. Petition by receiver or assignee of plaintiff's title, to continue action in his own name.
2325. Petition by executor, administrator, or heir of deceased plaintiff.
2326. Order for revivor and continuance.
2327. Notice of motion for leave to continue action, and serve supplemental complaint.
2328. Order, by consent, substituting executors, without prejudice to proceedings already had.
2329. Petition by surviving plaintiff to compel representative of deceased co-plaintiff to continue.
2330. Petition by defendant to have action continued, plaintiff having died, and action not having been revived on his behalf.
2331. Order to show cause, on the foregoing petition.
2332. Order thereon, absolute.
2333. Another form, in the alternative.
2334. Notice of motion to declare action dismissed, unless the proper parties revive it. (Wisconsin.)
2335. Affidavit.
2336. Order thereon.
2337. Notice of filing supplemental complaint and revival of action by plaintiff against personal representatives of deceased defendant. (Wisconsin.)
2338. Affidavit of attachment issued, and death of defendant before publication of summons completed.
2339. Order thereon.
2340. Stipulation in action against corporation, on the expiration of its charter, to continue in the name of new corporation.
2341. Notice of motion to substitute officer's successor.
2342. Affidavit therefor.
2343. Order thereon.

The codes generally provide that any action which survives shall not abate by the death, marriage, or other disability of a party, or by the transfer of interest or devolution of liability; but may be continued on application to the court in the name of the proper party.[1]

[1] Wis. Stats. 1913 secs. 2800-2810; Ariz. R. S. 1913 secs. 460-466; Ark. Dig. of Stats. 1904 secs. 6001, 6019, 6020, 6298; Cal. C. C. P. 1906 sec. 385; Colo. Code Ann. 1911 sec. 15; Idaho Rev. Codes 1908 sec.

In case the motion is made on behalf of the plaintiff it should be founded not only upon an affidavit showing the facts as to the transfer of interest or the devolution of the liability but by the proposed supplemental complaint stating those facts, as well as the facts constituting the original cause of action.

2323. Notice of motion on death or disability of plaintiff.

[*Title of original action.*]

Please take notice that on the annexed verified petition, and on the pleadings in this cause and upon the proposed supplemental complaint herewith served, the undersigned will move the court, at a special term to be held at ..... on the .... day of ....., 19.., at .... o'clock in the .... noon, or as soon thereafter as counsel can be heard, for an order directing the * above entitled action to be continued by C.... D.... [*describing his official or trust capacity, if any*] as plaintiff, in place of A.... B...., plaintiff above named, and granting the said C.... D.... leave to serve and file the said proposed supplemental complaint, and for such other relief as may be just.

[*Date.*]

[*Address.*] [*Signature.*]

2324. Petition by receiver or assignee of plaintiff's title, to continue action in his own name.

[*Title.*]

To the ..... court, held in and for the county of ....

THE PETITION of C.... D.... shows to the court:

I. That on or about the .... day of ....., 19.., one A.... B...., above named, commenced the above entitled action in this court * for [*here state briefly the cause of action, and then proceed to show what stage the cause is in, e. g., thus*], that issue was joined therein by the service of the defend-

4108; Iowa Ann. Code 1897 sec. 3443-3445; 3476; Kans. Gen. Stats. 1909 sec. 5632; Mont. Rev. Codes 1907 sec. 6494; Minn. Gen. Stats. 1913 sec. 7685; Mo. R. S. 1909 sec. 1916, 1924; Neb. R. S. 1913, sec. 7603; N. Dak. Rev. Codes 1905 sec. 6820; S. Dak. C. C. P. 1908 sec. 91; Okla. Comp. Laws 1909 sec. 5572; Oregon Laws 1910 sec. 38; Tex. Civ. Stats. Ann. 1913, art. 1886-1901; Utah Comp. Laws 1907 sec. 2920; Wash. Rem. and Bal. Code 1910 sec. 193; Wyo. Comp. Stats. 1910 sec. 4330.

ant's answer on the .... day of ....., 19..; that said action was referred, by order of this court, on the .... day of ....., 19.., to R.... F...., Esq., to hear and determine the same; that the trial thereof is now pending and undetermined before him.

II. That pending said action, and on the .... day of...., 19.., upon application duly made by O.... P...., a judgment-creditor of said A.... B.... in proceedings supplementary to execution, your petitioner was, by the order of [*name court or officer*] duly appointed receiver of the property of said A.... B....

[*Or:* II. That pending said action, and on the .... day of ....., 19..., said A.... B...., plaintiff in said action, duly assigned and transferred the note in the complaint mentioned, for a valuable consideration, to your petitioner, who is now the lawful owner and holder thereof.]

WHEREFORE your petitioner prays that he may be substituted as plaintiff in said action in place of said A.... B...., and that said action may be continued in his name, and that your petitioner be given leave to serve and file the proposed supplemental complaint attached hereto and that he have such other relief as may be just.

[*Date.*] [*Signature.*]

[*Venue.*]

C.... D...., being duly sworn, says that he has read [*or* heard read] the foregoing petition subscribed by him, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

[*Signature.*]

[*Jurat.*]

2325. Petition by executor, administrator, or heir of deceased plaintiff.

[*Title as in Form 2323.*]

To the ..... court in and for the county of .....

THE PETITION of C.... D.... and E.... F...., executors of the last will and testament [*or*, administrators] of the estate of A.... B...., deceased [*or*, heirs of A.... B.... deceased], shows to the court:

I. That on or about the .... day of ....., 19.., one A.... B.... commenced the above entitled action in this court for [*state the cause of the action, and its condition, as in Form 1766*].

II. That said A.... B.... died on or about the .... day of ....., last, and pending said action, having first duly made and published his last will and testament, by which, among other things, he appointed your petitioners his executors; that your petitioners have proved said will, and letters testamentary thereon were duly made and issued to them by the ..... court of the county of ..... on the .... day of ....., 19.., and that they have duly qualified and undertaken the execution thereof.

[*Or, where the application is by administrators:* II. That said A.... B.... died intestate on or about the .... day of ....., 19.., and pending said action; and that letters of administration upon his estate were duly made and issued, on the .... day of ....., last, by the .... court of the county of ....., to the petitioners, who have qualified and entered upon their duties as such administrators.]

III. That at the time of his death the said note [*or other cause of action*], was still owned by the said A.... B....; and the amount thereof, with the interest thereon, is still due from the said defendant; and the said [note] is now held by these deponents, and forms a part of the assets in their hands belonging to the estate of said A.... B...., deceased.

[*Or, where the application is by heirs, substitute for II and III above:* That said A.... B.... died intestate on or about the .... day of ....., 19.., and pending said action, and leaving your petitioners, who are his only children, his heirs-at-law, and as such they inherited all his interest and estate in the lands which are the subject of said action.]

IV. That your petitioners are desirous of continuing the action above referred to, as executors [*or* administrators, *or* heirs] of said A.... B...., against said Y.... Z.... and to serve and file the supplemental complaint hereto attached.

WHEREFORE, your petitioners pray that said action may be so continued by them, and that your petitioners may have leave to serve and file the annexed proposed supple-

mental complaint herein, and for such further relief as may be just.

[*Date.*] [*Signatures.*]

[*Verification as in last preceding form.*]

[*If the application be made more than a year after the death, the moving affidavits should show facts excusing the delay.*]

2326. Order for revivor and continuance.

[*Title.*] [*At a special term, etc.*]

On reading and filing the petition of C.... D...., dated the .... day of ....., 19.., and the pleadings in this action and the proposed supplemental complaint therein [and proof of due service of notice of this motion], and on motion of Q.... R.... counsel for said C.... D.... assignee [*or* receiver, *or* executor, *or* administrator, *or* heir] of the plaintiff, deceased, and after hearing O.... P...., of counsel for the defendant [*or* no one appearing] in opposition, *

ORDERED, that the above entitled action be continued by C.... D...., as plaintiff herein, in the place of A.... B...., plaintiff above named, and that the above entitled action be continued by him as receiver [*or otherwise*] of said A.... B.... and that he be allowed to make and file the said proposed supplemental complaint and that the service thereof heretofore made upon this motion stand as the completed service thereof.

[*In Nebraska the order should be conditional and may be as follows after the* *]:

ORDERED, that the defendants show cause before this court, at the court house in the .... of ..... on the first day of the ..... term, to-wit, the .... day of ....., 19.., or as soon thereafter as counsel can be heard, why the said action should not be revived in the name of R.... C.... as receiver [*or otherwise*] of the said A.... B...., and that if they fail so to do the action shall stand revived in the name of R.... C.... as receiver [*or otherwise*] as plaintiff.

[*Date.*] By the Court:

J.... K...., Judge.

2327. Notice of motion for leave to continue action, and serve supplemental complaint.

[*Title.*]

Take notice that on the affidavit of C.... D.... and the proposed supplemental complaint of which copies are herewith served upon you, and on the pleadings in this action, C.... D...., as executor of the plaintiff, will move the court, at a special term thereof to be held at ..... in ..... on the .... day of ....., 19.., at .... o'clock in the .... noon, or as soon thereafter as counsel can be heard, for leave to continue this action in the name of the said [executor] as plaintiff, and to serve and file said supplemental complaint in this action; or for such other or further relief as may be just.

[*Date.*]

O.... P....,
Attorney for C.... D....,
Executor.

[*Address.*]

2328. Order, by consent, substituting executors, without prejudice to proceedings already had.

[*Title.*] [*At a special term, etc.*]

On reading and filing the affidavit of M.... N...., showing the death of A.... B...., the plaintiff in the above entitled action, and the granting of letters testamentary, under and by virtue of his last will and testament, to C.... D.... and E.... F...., by the ..... court of .....county, and on motion of M.... N...., plaintiff's attorney * [the defendant's attorney consenting thereto]; or,

ORDERED, that this action be and the same is hereby revived and continued in the name of the said C.... D.... and E.... F...., executors of the last will and testament of A.... B...., deceased, as plaintiffs; and that the said executors be and they hereby are substituted as plaintiffs in the place and stead of the said A.... B...., deceased, and that such revivor and continuance be without prejudice to any of the proceedings already had in this action.

2329. Petition by surviving plaintiff to compel representative of deceased co-plaintiff to continue.

[*State action by two plaintiffs and death of one, leaving joint interest in his representatives and the survivor; see next succeeding form to the *, and continue*]: the said action has not

been revived or continued, or anything done therein; and that said [*representative*] refuses to allow your petitioner to continue said action in his name as administrator, as one of the plaintiffs.

WHEREFORE your petitioner prays for an order requiring the said [*representative*] to join your petitioner in an application to have the said action revived and continued in the name of the said [*representative*] as administrator as aforesaid, and this petitioner as plaintiff, by a certain time therein to be specified; or that your petitioner be allowed to take such proceedings as may be necessary to revive and continue said action, making the said [*representative*] administrator as aforesaid a party defendant in said action.

[*Date.*] [*Signature.*]

[*Verification as in Form 2324.*]

2330. Petition by defendant to have action continued, plaintiff having died, and action not having been revived on his behalf.

[*Title.*]

To the ..... court, held in and for the county of .....

THE PETITION of Y.... Z...., defendant above named, shows to this court:

I. That on or about the .... day of ....., 19.., A.... B.... above named commenced an action, in this court, against this defendant for [*here state the cause of action and its condition, as in Form 2324.*]

II. That as petitioner is informed and believes, A.... B...., plaintiff above named, died on or about the .... day of ....., last, having first made and published his last will and testament in due form of law, by which among other things, he appointed C.... D.... and E.... F.... his executors; that they have proved said will, and taken upon themselves the execution thereof; but, to the best of your petitioner's information and belief, * have failed to make any application to have the above entitled action continued by them as plaintiffs.

WHEREFORE your petitioner prays that the above entitled action may be continued in their names, or that the complaint herein be dismissed, so far as their interests are concerned, and that your petitioner have judgment thereupon

against the said C.... D.... and E.... F...., as executors aforesaid, for the costs of such action; or for such other order as may be just.

[*Signature.*]

[*Verification as in Form 2324.*]

2331. Order to show cause, on the foregoing petition.

On the within petition, let the plaintiffs show cause at a special term, to be held at ..... on the .... day of ....., 19.., at .... o'clock in the forenoon, why the above entitled action should not be continued in the names of C.... D.... and E.... F...., executors above named, or the complaint herein be dismissed, so far as the interests of said executors are concerned, with costs [*or* why the petition should not be granted].

2332. Order thereon, absolute.

[*As in Form 2326 to the* *, *continuing*]:

ORDERED, that the above entitled action be continued in the names of C.... D.... and E.... F.... as executors of A.... B...., plaintiff above named [*or*, that the complaint herein be dismissed so far as the interests of C.... D.... and E.... F...., executors of A.... B...., plaintiff above named, are concerned; that the defendant have leave to enter judgment against said C.... D..... and E.... F...., as executors, for the costs of the action, with ..... dollars costs of this motion].

2333. Another form, in the alternative.

[*As in Form 2326 to the* *, *continuing*]:

ORDERED, that the said C.... D...., executor as aforesaid, revive and continue said action, by filing and serving a supplemental complaint therein, within twenty days after service of a copy of this order; or that, in default thereof, the complaint in said action be dismissed, and the defendant have leave to enter judgment against the said C.... D...., executor, as aforesaid for the costs of such action.

2334. Notice of motion to declare action dismissed, unless the proper parties revive it (Wis. Stats. 1913 sec. 2811).

[*Title.*]

TAKE NOTICE, that on the affidavit of which a copy is herewith served, the undersigned will move the court at a special term to be held at ..... on the .... day of ....., 19.., at .... o'clock in the .... noon, or as soon thereafter as counsel can be heard,* to require this action to be revived and continued by the executor of the above named A.... B...., deceased, as plaintiff herein, within a time to be fixed by the court, or that, in default thereof, the action shall stand dismissed; or for such other relief as may be just.

[*Date.*] [*Signature.*]

[*Address.*]

2335. Affidavit.

[*Title.*]

[*Venue.*]

Y.... Z...., being duly sworn, says:

I. That he is the defendant in the above entitled action.

II. That this action is brought to recover [*state nature and object of action briefly, and the condition of the cause*].

III. That, as deponent is informed and believes [after issue was joined], in this action, to-wit, on the .... day of ....., 19.., the above named plaintiff died, having first made and published his last will and testament, by which he appointed C.... D...., of ....., his sole executor.

IV. That letters testamentary have been duly made and issued by the ..... court of ..... to the said C.... D...., who has accepted the same, and entered upon the duties of his office, and that no application to revive or continue this action has been made by said C.... D....

[*Signature.*]

[*Jurat.*]

2336. Order thereon.

[*As in Form 2328 to the *, continuing*]:

ORDERED, that C.... D...., executor of the above named A.... B...., deceased, be at liberty to continue this action as plaintiff therein in place of the said A.... B....,

and that in the event of his failure to appear and proceed therein as such, within .... months after service of a copy of this order upon ....., this action be dismissed.

2337. Notice of filing supplemental complaint and revival of action by plaintiff against personal representatives of deceased defendant (Wis. Stats. 1913 sec. 2810).

[*Title.*]

To [*name personal representatives of deceased defendant*].

TAKE NOTICE that a supplemental complaint in the above entitled action of which a copy is herewith served upon you was filed in the office of the clerk of the ..... court of ..... on the ..... day of ....., 19.., and that unless you show cause if any you have, by answer or affidavit within twenty days after service of this notice upon you exclusive of the day of such service why the above entitled action should not be revived or continued the same will stand revived or continued according to the said supplemental complaint.

Dated ....., 19..

L.... M....
Plaintiff's Attorney.

2338. Affidavit of attachment issued, and death of defendant before publication of summons completed.

[*Commencement as in other cases, and stating the nature of the cause of action.*]

I. That on the .... day of ....., 19.., he commenced proceedings for the purpose of bringing thereon an action against the defendant Y.... Z.... by publication of the summons against him, pursuant to the provisions of the statute, the said defendant being a non-resident of the state of ..... and residing in the town of ..... in the state of .....

II. That during the time of such publication, the deponent procured an attachment to be issued in his favor, in said action, against the said Y.... Z....; upon which, during the lifetime of the said Y.... Z.... the sheriff of the county of ..... seized a large quantity of goods, the prop-

erty of the said Y.... Z...., of the value of ..... dollars; and thereafter the said goods were so seized by the said sheriff, and before the said publication was completed, the said Y.... Z.... died, on or about the .... day of ....., 19..

[*Allege appointment of executors, as in Form 2325, and conclude as in other cases.*]

2339. Order thereon.

[*Commencement as in Form 2343.*]

ORDERED, that plaintiff have leave to proceed against C.... D...., the executor of said Y.... Z...., deceased, by the service of summons and complaint upon him as the defendant herein; and that the proceedings by attachment stand revived and continued in the name of said executor as defendant.

[*In Nebraska the order should be conditional. See Form 2326.*]

2340. Stipulation in action against corporation, on the expiration of its charter, to continue in the name of new corporation.

[*Title.*]

The act of incorporation by which the defendants, the president, directors, and company of the Bank of A...., were incorporated, having expired by its own limitation since this action was commenced, and the Bank of A.... having succeeded to the rights and liabilities of the defendants touching the subject-matter of this action:

It is therefore stipulated that the action be continued against the Bank of A...., without prejudice to the rights of either party on the merits, and that an order of the court may at any time be entered by either party to this effect.

[*Date.*] [*Signatures.*]

2341. Notice of motion to substitute officer's successor.

[*Title.*]

Please take notice that on the affidavit of A.... B...., of which a copy is herewith served, the undersigned will move the court, at a special term thereof to be held at ....., on

the .... day of ....., 19.., at .... o'clock in the forenoon, or as soon thereafter as counsel can be heard, to substitute W.... X...., supervisor of the town of ..... [*or other official designation*] in the place of Y.... Z...., as plaintiff [*or*, defendant] in this action; or for such other relief as may be just.

[*Date.*] [*Signatures.*]

[*Address.*]

2342. Affidavit therefor.

[*Title.*]

[*Venue.*]

M.... N...., being duly sworn, says that he is the attorney of the plaintiff [*or* defendant] in this action; that on the .... day of ..... last, W.... X...., of ....., was duly elected [*or* appointed] to the office of ..... of the [town of ..... in the] county of ....., in place of the [defendant Y.... Z....]; and that on the .... day of ..... last, the said W.... X.... entered upon the duties of said office, and still holds the same.

[*Signature.*]

[*Jurat.*]

2343. Order thereon.

[*Title.*] [*At a special term, etc.*]

On reading and filing the affidavit of M.... N.... [and proof of due service of notice] and on motion of M.... N...., after hearing O.... P.... [*or*, no one appearing] in opposition:

ORDERED, that W.... X...., of ..... [*designating official character*], be substituted as the [defendant] herein, in place of Y.... Z.... [and he is hereby required to appear and answer within .... days after service of a copy of this order].

CHAPTER CXXVII.

ADDITIONAL PARTIES, INTERVENTION AND INTERPLEADER UNDER STATUTORY PROVISIONS.

2344. Order by court, of its own motion, bringing in necessary parties.
2345. Petition by landlord to intervene in ejectment against tenant.
2346. Petition by owner of chattels to intervene in replevin.
2347. Petition by judgment-creditor to be made co-plaintiff in creditor's action.
2348. Notice of motion for intervention.
2349. Order to show cause why petition for intervention should not be granted.
2350. Order granting motion for intervention.
2351. Petition for intervention in replevin. (Iowa.)
2352. Notice of motion for interpleader.
2353. Affidavit by defendant, for interpleader of third person in action on contract.
2354. The same, in action of replevin.
2355. The same, where the third party claims a part only of the property.
2356. Order of interpleader.
2357. Another form, delivery of specific property, and appointing a receiver therefor.
2358. Commencement of complaint by intervener.

Ample provisions are generally made in the codes of the various states for bringing in new parties in actions already pending. When it is necessary for a complete determination of a controversy that other parties be brought in, they may be brought in by the court of its own motion, or upon motion of any of the parties to the action.

In ejectment and replevin any person having an interest in the subject matter may himself petition to be made a party on a showing by affidavit or petition, and will be let in as a party if his showing be sufficient. The same relief may be had in any action by a third party who shows that he has such interest in the subject matter as to require that he be made a party for his own protection, or that a complete determination of the controversy cannot be had without his presence. This proceeding is properly called *intervention.*

In actions on contract, or to recover specific real or personal property or its value, when a third person makes demand for the same debt or property the defendant may, on a showing of the facts, have such third party brought in to contest the plaintiff's claim. By some statutes a garnishee may invoke this relief. This proceeding is a statutory *interpleader*, and performs the function of the equity bill of interpleader, and ordinarily takes its place. McDonald v. Allen, 37 Wis. 108.

In a foreclosure action, after judgment and before sale, the plaintiff may bring in a necessary or proper party for the purpose of barring his rights by the judgment. Wis. Stats. 1913 sec. 3161.

Generally on the subjects referred to above see the statutes cited in note.[1]

2344. Order by court, of its own motion, bringing in necessary parties.

[*Title.*] [*Caption.*]

This action having come on for trial at said term on the .... day of ....., 19.., before the court, E.... F.... appearing for the plaintiff, and G.... H.... for the defendant, and it appearing to the court that L.... M.... and N.... O.... are necessary parties defendant in this action, without whose presence therein a complete determination of the controversy can not be had; and that they have such an interest in the subject-matter of the controversy that the court should require them to be made parties for their due protection:

[1] Wis. Stats. 1913 secs. 2610, 2611 2767; Ariz. R. S. 1913 secs. 409, 410, 486, 1603, 3660; Ark. Dig. of Stats. 1904 secs. 6011, 6013, 391, 4055; Cal. C. C. P. 1906 secs. 386, 387, 389; Colo. Code Ann. 1911 secs. 16-18; Idaho Rev. Codes 1908 secs. 4109-4111; Iowa Ann. Code 1897 secs. 3476, 3487, 3594; Kans. Gen. Stats. 1909 secs. 3382, 4391, 5633, 5634, 5638, 5834; Mont. Rev. Codes 1907 secs. 6495, 6496, 6498; Minn. Gen. Stats. 1913 secs. 7690, 7764-7766; Mo. R. S. 1909 secs. 1849, 2345, 2421, 2835; Neb. R. S. 1913 secs. 7604-7606, 7608, 7609; N. Dak. Rev. Codes 1905 secs. 6824, 6826, 6816; S. Dak. C. C. P. 1903 secs. 95-98; Okla. Comp. Laws 1909 secs. 5573, 5574, 5578; Oregon Laws 1910 secs. 40, 41; Tex. Civ. Stats. Ann. 1913 arts. 1848, 1820; Utah Comp. Laws 1907 secs. 2924-2926; Wash. Rem. and Bal. Code 1910 secs. 196, 198, 202; Wyo. Comp. Stats. 1910 secs. 4332, 4334, 4324.

ORDERED, That said L.... M.... and N.... O.... be made parties defendant to this action, and that the summons and complaint be amended by the addition of said L.... M.... and N.... O.... as defendants, and otherwise as the plaintiff may be advised. That within twenty days from the date hereof, the plaintiff cause said amended summons and complaint to be served on said defendants hereby brought in, and that they and each of them have twenty days, after such service, in which to answer said amended complaint. That the trial herein be postponed until the action is ready for trial against said defendants hereby brought in.

By the Court:
J.... K...., Judge.

2345. Petition by landlord to intervene in ejectment against tenant.

[*Title.*]

To the Circuit Court for ..... County.

THE PETITION of L.... M...., of ..... in said county, respectfully represents:

I. That the action above entitled is now pending in this court, for the recovery by said plaintiff from the defendant of the following described real estate and premises, situate in said county, to-wit [*describe same*] which action has not proceeded to judgment [but is at issue], [*or*, and the time for answering the complaint therein has not yet expired].

II. That said defendant C.... D.... occupies said premises as tenant of your petitioner, and not otherwise.

III. That your petitioner is the owner in fee-simple of said premises, and the whole thereof, having acquired title thereto by [*here indicate the source of title*], and that the plaintiff in said action has no interest, right of possession or title in the said premises.

WHEREFORE your petitioner prays that he be allowed to come in as a party defendnat to defend this action; and that all proceedings be stayed in said action [on the part of either party] until a hearing can be had upon this petition.

L.... M....,
Petitioner.

[*Verification as in Form 2324.*]

2346. Petition by owner of chattels to intervene in replevin.

[*Title.*]

To the ..... court of ..... county.

THE PETITION of L.... M.... respectfully represents:

I. That the above entitled action is now pending in this court for the recovery of the possession of certain personal property, to-wit [*description of property*]; which action has not, as deponent is informed and believes, proceeded to judgment.

II. That the defendant received the said [*property*] from this deponent for storage, and this deponent is the sole owner thereof.

III. That the claim of the plaintiff in this action is made adversely to deponent's title, and deponent desires to litigate the question directly with him.

WHEREFORE, etc. [*as in last preceding form.*]

L.... M....,

[*Verification as in Form 2324.*] Petitioner.

2347. Petition by judgment-creditor to be made co-plaintiff in creditor's action.

[*Title.*]

To the ..... court for ..... county.

THE PETITION of L.... M...., of ..... in said state, respectfully represents:

I. That this action was brought by the above named plaintiff as a judgment creditor of the above named defendant C.... D...., to reach the property of said C.... D...., alleged to have been fraudulently conveyed to the said defendants, G.... H.... and E.... F...., and to set aside the conveyances and transfer as fraudulent and void as against creditors of the said C.... D....

II. That your petitioner is a judgment creditor of said defendant C.... D...., having duly recovered a judgment against him in the ..... court for ..... county, on the .... day of ....., 19.., for the sum of ..... dollars damages, and ..... dollars costs, in all ..... dollars, which judgment remains in full force and unappealed from, and that there is now due and unpaid thereon the sum

of ..... dollars with interest from said day of rendition.

III. That on the .... day of ....., 19.., execution was duly issued on the said judgment, to the sheriff of ..... county, commanding him to satisfy said judgment out of the personal property of the said defendant C.... D...., and if sufficient personal property could not be found, then out of the real property belonging to the said defendant, on the day when said judgment was docketed, in said county, to-wit, the .... day of ....., 19.., or at any time thereafter, which said execution was afterwards, on the .... day of ....., 19.., returned by said sheriff wholly unsatisfied.

IV. That your petitioner is ready and willing to contribute to the expense of the action on being let in as a party co-plaintiff, and that [*here state any special circumstances that render it necessary or desirable that the petitioner be let in, if any exist.*]

YOUR PETITIONER therefore prays that he be allowed to come in as a party plaintiff in this action [and to prosecute the same]; and for such further relief as may be just.

L.... M....,
[*Verification as in Form 2324.*] Petitioner.

2348. Notice of motion for intervention.

[*Title.*]

TAKE NOTICE, that on the annexed petition and on the pleadings in this action, the undersigned will move the court, at a special term to be held at ..... on the .... day of ....., 19.., at .... o'clock in the .... noon or as soon thereafter as counsel can be heard, for an order directing L.... M.... the petitioner above named, to be made a party defendant in the action now pending in this court between A.... B...., plaintiff, and Y.... Z...., defendant, and for such other relief as may be just.

[*Date.*] E.... F....,
[*Address.*] Attorney for Petitioner.

2349. Order to show cause why petition for intervention should not be granted.

[*Title.*] [*Caption.*]

On reading and filing the petition of L.... M.... of

..... praying to be let in as a party defendant in this action.

IT IS ORDERED that the plaintiff [and defendant] herein show cause, on the .... day of ....., 19.., at the opening of court on that day, or as soon thereafter as counsel can be heard, why the prayer of said petitioner should not be granted.

Further ordered that until the determination of this motion all proceedings herein on the part of the plaintiff [and defendant] be stayed.

And let copies of this order and said petition be served on the attorneys of the plaintiff and defendant respectively, at least .... days before the hearing of such motion.

By the Court:

J.... K...., Circuit Judge.

2350. Order granting motion for intervention.

[*Title.*] [*At a special term, etc.*]

On reading and filing the petition of L.... M.... dated the .... day of ....., 19.. [and proof of due service of notice of this motion], and on motion of O.... P.... for said C.... D...., and after hearing Q.... R.... [*or* no one appearing] in opposition:

ORDERED that L.... M.... be made a party defendant herein, and that the summons and complaint be amended accordingly [and that plaintiff have leave to amend them in other respects as he may be advised]; and that within .... days after service of a copy of this order on the plaintiff's attorney, the plaintiff cause said amended summons and complaint to be served on said L.... M.... and that said L.... M.... have twenty days after such service in which to answer said complaint, and that this cause thereupon proceed as if said L.... M.... had been originally made a defendant therein. Let all proceedings on the part of the plaintiff be stayed until said answer be served or the time herein fixed for the service thereof shall have expired.

By the Court:

J.... K...., Judge.

2351. Petition for intervention in replevin (Iowa).

[*Title.*]

To the ..... court of the county of .....

THE PETITION of L.... M.... respectfully shows to the court:

[*Here state facts showing nature of the action, and its present condition, as well as the facts showing the interest or ownership of the petitioner, as would be done in a complaint.*]

WHEREFORE your petitioner asks leave to intervene in this action as against both plaintiff and defendant therein [*or as the case may be*], and he demands judgment against both plaintiff and defendant [*or as the case may be*], for the property described in this petition of intervention and in the petition of the plaintiff in said action [*or for the possession of the same, as the case may be*] or for the value thereof if the same can not be found, and for his damages and costs.

O.... P....,
Attorney for Intervener.

[*Verification.*]

[*In Iowa this petition becomes the pleading of the intervener and is to be answered as other pleadings.*]

2352. Notice of motion for interpleader.

[*Title.*]

Take notice, that on the petition of C.... D.... herewith served, and on the complaint herein, the defendant will move the court, at a special term to be held at ..... on the .... day of ....., 19.., at .... o'clock in the .... noon, or as soon thereafter as counsel can be heard, to substitute O.... P.... of ..... in his place, as defendant herein, and to discharge this defendant from liability to either the plaintiff or to the said O.... P.... concerning the agreement [*or otherwise designate the contract*] mentioned in the complaint, upon this defendant's paying into court the sum of ..... dollars, the amount claimed in the summons herein [*or, if action is for specific property, say:* concerning the property mentioned in the complaint, upon said defendant's transferring the same to such person as the

court may direct]; or for such other relief as may be just [and for the costs of this motion].

[*Date.*]

N.... O....,
Defendant's Attorney.

[*Address.*]

2353. Affidavit by defendant, for interpleader of third person in action on contract.

[*Title.*]

[*Venue.*]

C.... D..., being duly sworn, says:

I. That he is the defendant in the above entitled action.*

II. That the same is brought on a contract, which is set forth in the complaint, and that the time for answering said complaint has not expired, and the defendant has not yet answered in this action.

III. That one [*name the claimant*], who is not a party to this action, makes a demand against the defendant for the same debt for which this action is brought, which demand is made without any collusion with the defendant.

IV. That on the .... day of ....., 19.., said [*name claimant*] served on the defendant a notice and demand of which a true copy is hereto annexed.

V. That the defendant is unacquainted with the rights of the respective claimants, and does not know to whom to pay the amount due upon said contract set forth in the complaint.

THE DEFENDANT therefore prays for an order substituting said [*claimant*] as defendant in this action, and discharging the defendant from liability to either party on his depositing in court the amount of said debt, which deposit he hereby offers to make.

C.... D....

[*Jurat.*]

2354. The same, in action of replevin.

[*Proceed as in last preceding form to the *, and continue*]:

II. That the same is brought to recover from the defendant the following described personal property, to-wit [*describe same*].

III. That the complaint herein was served on the .... day of ....., 19.., and the time for answering has not yet expired, and the defendant has not yet answered the same.**

IV. That one [*name claimant*] who is not a party to this action, makes a demand against the defendant for the whole of the same property, the possession of which this action is brought to recover.

V. That the said demand is made without collusion with the defendant and [*here allege any facts, as to possession, showing that the defendants are not liable for any damages for detention, or otherwise, according to facts of case*].

VI. That the defendant does not know the rights of the respective claimants, nor to whom said property should be delivered.

DEFENDANT therefore prays the court to substitute said [*claimant*] as defendant herein, and to discharge this defendant from all liability to either party so claiming, upon his delivering the said property, or its value, to such persons as the court may order, which he hereby offers to do.

C.... D....

[*Jurat.*]

2355. The same, where the third party claims a part only of the property.

[*Proceed as in last preceding form to the* **, *and continue*]:

IV. That a part of said property, to-wit [*here describe the part*], is claimed by one [*name claimant*] who has notified the defendant that he owns and is entitled to the possession of such part, and demands the same of this defendant [as by the written notice and demand of which a true copy is hereto annexed, will more fully appear].

V. That the defendant is ignorant of the rights and merits of the respective claims of said plaintiff and said [*claimant*] and that a complete determination of the questions in controversy can not be had without the presence of said [*claimant*] as a party to this action [and that, as to the property so claimed by said claimant, this defendant makes no claim].

VI. That all said property has been taken from the possession of this defendant by the sheriff of ..... county, upon the requisition of the plaintiff in this action.

WHEREFORE, etc.

C.... D....

[*Jurat.*]

2356. Order of interpleader.

[*Commencement and recitals as in Form 2344.*]

ORDERED that on payment by the defendant to the clerk of this court of the amount claimed in the summons herein, principal and interest, less ten dollars costs of this motion, within five days from the entry of this order, O.... P.... be substituted as defendant in this action in place of Y.... Z..., the defendant above named, and that said Y.... Z.... thereupon be discharged from liability to either the plaintiff above named or said O.... P....

And further ordered that the said O.... P.... have leave to appear and defend this action within twenty days after service upon him of a copy of this order, together with a copy of the complaint herein, and that in case he fail so to do the plaintiff may apply to the court for judgment as by default, and for such other relief as he may be entitled to.

By the Court:

J.... K...., Judge.

2357. Another form, delivery of specific property, and appointing receiver therefor.

[*Commencement and recitals as in last preceding form.*]

ORDERED: 1. That the defendant deliver the property mentioned in the complaint herein to R.... S..., Esq., of ....., who is hereby appointed receiver thereof.

2. That O.... P...., of ..... be substituted as defendant in this action, in place of the above named Y.... Z...., who shall, upon delivery of the said property to the said receiver, be discharged from all liability therefor, either to the plaintiff or to the said O.... P....

3. That the said receiver hold the said property, subject to the further direction of this court. [*If any special authority is needed, as for the collection of incomes, or the sale of the property, insert it here.*]

4. That within .... days after entry [*or* notice] of this order, the plaintiff serve a summons and a copy of his complaint, amended as he may see fit [*with a copy of this order*], upon the said O.... P....; and that the said O.... P... answer such complaint within .... days thereafter.

5. That if the plaintiff neglect to serve his summons and complaint and this order as herein directed, the defendant Y.... Z.... may apply to the court for an order dismissing the action, and that the said property be delivered by the receiver to the said defendant Y.... Z....; and if the said O.... P.... neglect to answer such complaint, if served as herein directed, the plaintiff may apply, on notice, for an order that said property be delivered by the receiver to the plaintiff.

That ..... dollars costs be allowed to the said Y.... Z...., to be deducted by him out of the fund [*or*, to be paid by the plaintiff, and allowed to him in case of his final recovery of judgment].

By the Court:

J.... K...., Judge.

2358. Commencement of complaint by intervener.

[*Title.*]

Now comes E.... F.... and by leave of the court first had and obtained serves and files this his complaint in intervention in the above entitled action and as grounds of his intervention alleges [*state the facts on which intervener's rights are based as in a complaint or answer*].

CHAPTER CXXVIII.

CHANGE OF VENUE.

2359. Demand for change by party because action is not brought in the county in which defendant resides.
2360. The same, by defendant's attorney, combined with notice of retainer.
2361. The same specifying other reasons than residence.
2362. Consent to change.
2363. Affidavit for change on failure to consent.
2364. Notice of motion for change.
2365. Order to show cause with stay of proceedings.
2366. Affidavit for change because impartial trial cannot be had.
2367. Affidavit for change for convenience of witnesses.
2368. Affidavit for change in case appealed from justice court (Wisconsin.)
2369. Affidavit for change of venue on ground of prejudice of judge. (Wisconsin.)
2370. The same, on account of disqualification of judge.
2371. Order changing venue.
2372. Stipulation to change place of trial. (Wisconsin.)
2373. Order changing venue on stipulation.
2374. Order changing venue for alleged prejudice of judge. (Wisconsin.)
2375. Order changing venue, on judge's own motion.
2376. Affidavit by plaintiff to oppose change asked for on ground of convenience of witnesses.

Proceedings to change the place of trial of pending actions are purely statutory, and the statutes of the various states vary considerably as to the grounds upon which an application for such change may be made. Most of the statutes agree substantially in providing that such change may be had when it appears either (1) that the county in which the action is brought is not the county fixed by statute for the trial of such an action; (2) where it appears that an impartial trial cannot be had therein, either by reason of prejudice of the people or disqualification or prejudice of the judge; (3) when the convenience of witnesses and the ends of justice would be promoted by a change.[1]

[1] Wis. Stats. 1913 secs. 2622-2624; Ariz. R. S. 1901 secs. 494-503; Ark. Dig. of Stats. 1904 sec. 7996 *et seq.*; Cal. C. C. P. 1906 sec. 397 *et seq.*; Colo. Code Ann. 1911, secs. 31-33; Idaho Rev. Codes 1908 sec. 4125 *et seq.*; Iowa Ann. Codes 1897 sec. 3505 *et seq.*; Kans. Gen. Stats.

The forms given in this chapter were primarily prepared for use in Wisconsin; they may, however, be easily varied to meet the requirements of the statute of any of the other code states.

2359. Demand for change by party because action is not brought in the county in which defendant resides.

[*Title of cause.*]

I hereby demand that the trial of this action be had within the proper county, viz., the county of [*designating it*] for the reason that at the time of the commencement of this action I resided and still reside in the city of ..... in said county of ..... [*or otherwise state the reason according to the fact and the provision of the statute*].

[*Date.*] C.... D...., Defendant above named.

[*Address.*]

2360. The same, by defendant's attorney, combined with notice of retainer.

[*Title.*]

Take notice that the undersigned is retained by and hereby appears for the defendant in the above entitled action; and that the defendant demands that the trial of this action be had within the proper county, to-wit, the county of ..... for the reason that * the said defendant at the time of the commencement of this action, resided and still resides in the city of ..... in said county of .....

[*Date.*] G..... H..... Defendant's Attorney.

[*Address.*] [*P. O. address.*]

1909 sec. 5650; Mont. Rev. Codes 1907 sec. 9219 *et seq.*; Minn. Gen. Stats. 1913 sec. 7723 *et seq.*; Mo. R. S. 1909 sec. 1927 *et seq.*; Neb. R. S. 1913 sec. 7621 *et seq.*; N. Dak. Rev. Codes 1905 secs. 6830-6831; S. Dak. C. C. P. 1908 sec. 102; Okla. Comp. Laws 1909 sec. 5590; Oregon Laws 1910 sec. 45 *et seq.*; Tex. Civ. Stats. Ann. 1913 art. 1911 *et seq.*; Utah Comp. Laws 1907 secs. 2934-2937; Wash. Rem. and Bal. Code 1910 sec. 209 *et seq.*; Wyo. Comp. Stats. 1910 sec. 5142 *et seq.*

2361. The same specifying other reasons than residence.

[*Proceed as in either of two preceding forms to the * and continue*]: the said action is brought for the recovery of certain real property none of which is situated within the county of [*name county in which action is brought*] but all [*or* a part] of which is situated within the county of [*name proper county*].

[*In case the reason for the change be other than that above named, specify it, following the particular statute closely.*]

[*Date.*] G.... H....
Defendant's Attorney.

[*Address.*] [*P. O. address.*]

2362. Consent to change.

[*Title.*]

Take notice that the above named plaintiff consents that the place of trial of this action be changed to ..... county.

[*Date.*] E.... F....,
Plaintiff's Attorney.

[*Address.*] [*P. O. address.*]

2363. Affidavit for change on failure to consent.

[*Title.*]

[*Venue.*]

C.... D..., being duly sworn on oath, says that he is the defendant in the above entitled action.

That the same was commenced on the .... day of ....., 19.., by service of the summons and complaint on said defendant.

That at the time of the commencement of this action, the said defendant resided and still resides in the city of ..... in the county of .....

That on the .... day of ....., 19.., the defendant's attorneys served on the attorneys for the plaintiff, a demand in writing that the place of trial of this action be changed to ..... county, of which demand a copy is hereto annexed.

That no written consent to said change has been served by the plaintiff's attorneys on the defendant's attorneys, or received by them in this action.

[*If the residence of the defendant be not the ground, insert in the foregoing affidavit instead of the statement as to residence of the defendant, the true ground as it is stated in the*

particular statute e. g., that the said action is brought for the recovery of certain real property, none of which is situated within the county of ..... but all of which is situated within the county of .....]

[*If required by the particular statute add an affidavit of merits as in Form 2366.*]

2364. Notice of motion for change.

[*Title.*]

Take notice that upon the summons and complaint in this action, the demand for change of place of trial heretofore served on you, and the affidavit of C.... D...., herewith served on you, the undersigned will move the court at the next regular term thereof to be held in the court house in the city of ..... in said county, on the .... day of ....., 19.., at the opening of court on said day or as soon thereafter as counsel can be heard [*or if the motion be before the judge*] will apply to the Hon. L.... M...., circuit judge, at his chambers in the court house in the city of ..... in said county, on the .... day of ....., 19.., at .... o'clock A. M.] for an order changing the place of trial of this action to ..... county, for the reason that [*state reasons as in demand and affidavit*].

Dated ....., 19.. L.... M....
Defendant's Attorney.

2365. Order to show cause with stay of proceedings.

[*Title.*]

On the affidavit of C.... D.... served herewith, and the demand therein mentioned, and on the pleadings, let the plaintiff show cause at a ..... term to be held at ..... on the .... day of ....., 19.., at .... o'clock in the .... noon, or as soon thereafter as counsel can be heard, why the place of trial of this action should not be changed from the county of ..... to the county of .....; and why the defendant should not have the costs of this motion, and such other relief as may be just. And until the determination of this motion, let all the proceedings on the part of the plaintiff be stayed.

Let this order and said affidavit be served on the plaintiff's attorney on or before the .... day of ....., 19..

By the Court:

L.... M...., Circuit Judge.

2366. Affidavit for change because impartial trial cannot be had.

[*Title.*]

[*Venue.*]

C.... D...., being first duly sworn, says that he is the defendant in this action.

That the summons and complaint in this action were served on him on the .... day of ....., 19..; and that issue was joined by the service of this defendant's answer on the .... day of ....., 19..

That this affiant has fully and fairly stated the case in this action to G.... H...., Esq., his counsel, who resides in the city of ..... in said county, and that upon such statement thus made he is advised by his said counsel and verily believes that he has a valid and substantial defense to said action upon the merits, and to the whole thereof [*or to some part thereof, specifying what part*].

That an impartial trial cannot be had in the county in which this action is pending, as this affiant has reason to believe and verily does believe; and that the reasons and grounds of this belief are as follows, to-wit [*here state the reasons why an impartial trial cannot be had, with particularity; if there be widespread prejudice of the people not only should the fact be stated but it must appear that the affiant has occasion to know that such is the fact by investigation, and the affidavits of third persons who have mixed with the people and are able to testify from personal knowledge should be added. The affidavit of the party himself will rarely suffice*].

C.... D....

[*Jurat.*]

2367. Affidavit for change for convenience of witnesses.

[*Title.*]

[*Venue.*]

C.... D...., being first duly sworn, says that he is the defendant in this action, and that the same was commenced

on the .... day of ....., 19.., by the service of the summons and complaint; and that issue was joined therein by service of defendant's answer on the .... day of ....., 19..

That this affiant has fully and fairly stated the case in this action to G.... H..., Esq., his counsel, who resides at ..... in said county; and that upon such statement thus made he is advised by his said counsel and verily believes that he has a valid defense to said action upon the merits, and to the whole thereof [*or to a part therof, specifying what part*].

That the facts which the defendant expects to prove to establish his defense are the following [*here state the same*].

That this affiant has fully and fairly stated to his said counsel the facts which he expects to prove by each and every one of the following named witnesses, viz. [*name proposed witnesses*]; and that he is advised by said counsel and verily believes that each and every one of said witnesses are material and necessary to his defense, and that without their testimony he can not safely proceed to trial; and that each and all of said witnesses reside in the county of ....., to-wit [*here specify where each witness resides*].

That the convenience of said witnesses requires that the place of trial of this action be changed to said county of ....., and this affiant makes this affidavit for the purpose of moving for such change.

That no previous application for change of place of trial herein has been made, and no change has heretofore been made.

C.... D....

[*Jurat.*]

2368. Affidavit for change in case appealed from justice court (Wis. Stats. 1913 sec. 2624).

[*Venue.*]

C.... D...., being first duly sworn says:

That he is defendant in the above entitled action, and that the same is now pending on appeal of this defendant from a judgment rendered in said action, before J.... P...., Esq., a justice of the peace of said county, on the .... day of ....., 19.., in favor of the plaintiff and against this de-

fendant, for the sum of ..... dollars and .... cents, damages, and ..... dollars and .... cents costs [*or otherwise describe judgment*].

That this action was commenced by process personally served on affiant on the .... day of ....., 19.., and that the affiant was not then a resident of said county, but then resided and ever since has resided and now resides in the county of .....; and defendant demands a change of the place of trial to said county of ....., the county of his residence.

C.... D....

[*Jurat.*]

2369. Affidavit for change of venue on ground of prejudice of judge (Wis. Stats. 1913 sec. 2625).

[*Title.*]
[*Venue.*]

C... D...., being first duly sworn, says that he is the defendant in this action, and that he has good reason to believe and does believe that he cannot have a fair trial in such action in said court on account of the prejudice of the judge thereof, the Hon. L.... M....; and the defendant makes this affidavit for the purpose of applying for a change of the place of trial to some county where the cause complained of does not exist.

C.... D....

[*Jurat.*]

[*This affidavit may be filed at any time before the trial begins, but notice of the motion should be given if it is desired to avoid payment of witness fees.*]

2370. The same, on account of disqualification of judge.

[*Title.*]
[*Venue.*]

C.... D...., being duly sworn says that he is the defendant in the above entitled action; that the Hon. L.... M...., judge of the above named court, in which this action has been commenced and is pending, is related to the plaintiff, to-wit, the said L.... M.... is [*name relationship showing it to be within the statutory degrees if the statute*

names degrees] [*or if the disqualification arises from interest in the controversy state the same.*]

C.... D....

[*Jurat.*]

2371. Order changing venue.

[*Title.*] [*Caption.*]

On reading and filing the affidavit of [*here name all affidavits and papers on which motion is based*], and on the pleadings herein, and after hearing G.... H...., Esq., of counsel for the defendant, and E.... F...., Esq., of counsel for the plaintiff, due proof of service of notice of this motion [*or* the order to show cause why this motion should not be granted] having been made and filed; and the court being advised in the premises,

ORDERED that the place of trial of this action be and hereby is changed from ..... county to the county of ..... which is the proper place of trial of the same [*or*, on the ground that there is reason to believe that an impartial trial can not be had in said county of .....; *or*, for the reason that the convenience of witnesses and the ends of justice will be promoted by such change] [and that the defendant have ten dollars, the costs of this motion].

By the Court:

J.... K...., Circuit Judge.

2372. Stipulation to change place of trial (Wis. Stats. 1913 sec. 2622).

[*Title.*]

It is hereby stipulated and agreed that the place of trial of this action be changed to ..... county [and that the plaintiff advance the costs of making such change, to abide the event of the action].

[*Date.*]

E.... F...., Plaintiff's Attorney.

G.... H...., Defendant's Attorney.

2373. Order changing venue on stipulation.

[*Title.*] [*Caption.*]

The parties hereto having stipulated that the place of

trial of this action be changed from ..... county to ..... county,

ORDERED that the place of trial of this action be changed in accordance with said stipulation, from ..... county to ..... county.

By the Court:
J.... K...., Circuit Judge.

2374. Order changing venue for alleged prejudice of judge (Wis. Stats. 1913 sec. 2625).

[*Title.*] [*Caption.*]

On the affidavit of the defendant, C.... D...., alleging that he has good reason to believe and does believe that he cannot have a fair trial in this action in this court, on account of the prejudice of the judge thereof, the Hon. [*name the judge*], and on motion of G.... H...., Esq., defendfendant's attorney,

ORDERED that the place of trial of this action be and hereby is changed from ..... county to the county of.....

[*Date.*]

By the Court:
L.... M...., Circuit Judge.

2375. Order changing venue, on judge's own motion.

[*Title.*] [*Caption.*]

This cause being now pending in this court at issue, and it appearing to the judge thereof, that he has been of counsel for one of the parties thereto [*or*, that he is interested in the subject matter thereof, *or*, that he is related to one of the parties], therefore,

ORDERED that the place of trial of this action be changed from ..... county to ..... county.

[*Date.*]

By the Court:
L.... M...., Circuit Judge.

2376. Affidavit by plaintiff to oppose change asked for on ground of convenience of witnesses.

[*Title.*]

[*Venue.*]

A.... B...., plaintiff above named, being duly sworn, says:

That he has fully and fairly stated to M.... N...., his counsel in this cause, who resides at ....., in the county of ....., the facts which he expects to prove by each and every one of the following witnesses, viz., C.... D...., of the town of ..... [*etc., naming all the witnesses*], all of whom reside in said county of .....; and that they are, each and every one of them, material and necessary witnesses for this plaintiff on the trial of this cause, as he is advised by his said counsel, and verily believes; and that without the testimony of each and every one of said witnesses, this plaintiff cannot safely proceed to the trial of this cause, as he is also advised by his said counsel, and verily believes.

That the facts which this plaintiff expects to prove by said witnesses, are as follows [*state in detail the facts and circumstances which the plaintiff expects to prove by each witness, naming him, and showing their materiality*].

A.... B....

[*Jurat.*]

CHAPTER CXXIX.

CONSOLIDATION OF ACTIONS.

2377. Affidavit for consolidation of actions.
2378. Notice of motion therefor.
2379. Order consolidating actions.

When two or more actions are pending in the same court which might have been joined they may be consolidated on motion, in the discretion of the court.[1]

In order to justify consolidation it must appear either by the pleadings or affidavits, or both, that the actions are of such nature that they might have been joined under the provisions of the statute, and that either no defense is intended or that substantially the same defenses and questions are involved in both actions.

2377. Affidavit for consolidation of actions.

[*Give titles, separately, of the various causes.*]
[*Venue.*]

C.... D...., being duly sworn, says that he is the defendant [*or* one of the defendants] [*or if action be against a corporation:* president of the corporation defendant] in each and all of the above entitled actions, which are all pending in the ..... court aforesaid; that each of said actions is founded upon a promissory note alleged to have been made by defendant and owned by the plaintiff [*or otherwise state the nature of the various actions so as to show that they are all of a class which the statute permits to be joined*].

That the defendant has no defense to said actions and does not intend to defend the same [*or* that the defenses are identi-

[1] Wis. Stats. 1913 sec. 2792; Ariz. R. S. 1913 sec. 690, 691; Ark. Dig. of Stats. 1904 sec. 6083; Cal. C. C. P. 1906 sec. 1048; Colo. Code Ann. 1911 sec. 20; Idaho Rev. Codes 1908 sec. 4926; Iowa Ann. Code 1897 sec. 3644; Kans. Gen. Stats. 1909 sec. 5739; Mont. Rev. Codes 1907 sec. 7187; Minn. Gen. Stats. 1913 sec. 7767; Mo. R. S. 1909 sec. 1963; Neb. R. S. 1913 sec. 7659; N. Dak. Rev. Codes 1905 sec. 7345; S. Dak. C. C. P. 1908 sec. 567; Okla. Comp. Laws 1909 sec. 5685; Oregon Laws 1910 sec. 526: Tex. Civ. Stats. Ann. 1913 art. 2182; Utah Comp. Laws 1907 sec. 3489; Wyo. Comp. Stats. 1910 sec. 4443.

cal in all of said actions, namely: *stating briefly the defenses, as:* that the said notes were executed by defendant to plaintiff under duress, as more fully set forth in the answer of the defendant, a copy of which is hereto attached, and that the issues which will arise and be tried are the same in all of said actions, *or otherwise state the nature and identity of the defenses, according to the fact*].

[*State whether causes are at issue, and if so when issue was joined, and if plaintiff has refused to consent to consolidation, state the fact*].

C.... D....

[*Jurat.*]

2378. Notice of motion to consolidate actions.

[*Give titles of all the actions separately.*]

TAKE NOTICE that upon the affidavit of C.... D...., herewith served, and upon the pleadings heretofore filed and served in the above entitled actions, the defendant will move the court at a .... term thereof, to be held at the court house in the city of ..... in said county, on the .... day of ..... next, at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order consolidating the two above entitled actions into one, with costs of motion.

[*Date.*]

G.... H....

[*Address.*] Defendant's Attorney.

2379. Order consolidating actions.

STATE OF .....
..... Court ..... County.

A.... B....,
Plaintiff,
vs.
C.... D....,
Defendant.

Action commenced
....., 19..

A.... B....,
Plaintiff,
vs.
C.... D....,
Defendant.

Action commenced
....., 19..

The motion of the defendant for the consolidation of the two actions above entitled into one, coming on to be heard at said term, upon the affidavit of C.... D...., and the pleadings in said actions, and the court having heard G.... H...., Esq., attorney for defendant, and E.... F...., Esq., attorney for the plaintiff, respectively, for and against the motion, and being advised in the premises:

IT IS ORDERED that the said actions be and they are hereby consolidated into one action, and that the several statements of the causes of action in the respective complaints stand as the complaint in said consolidated action, and the answers already served stand as the answer thereto; and that the defendant have and recover ten dollars costs of motion.

[*Date.*]

By the Court:
L.... M...., Judge.

CHAPTER CXXX.

OFFERS OF JUDGMENT AND TO LIQUIDATE DAMAGES.

2380. Offer to allow judgment.
2381. Notice of acceptance thereof.
2382. Affidavit to enter judgment thereon.
2383. Judgment thereon.
2384. Offer to liquidate damages (served with answer).
2385. Notice of acceptance thereof.

The codes quite generally provide that the defendant may at any time before the trial serve on the plaintiff an offer to permit judgment to be taken by the plaintiff for the sum, or property, or to the effect therein specified, with costs, and if the offer be not accepted within a specified time it is deemed withdrawn; but if the plaintiff fail to recover a more favorable judgment he cannot recover costs from the time of the offer.[1]

2380. Offer to allow judgment.

[*Title.*]

The defendant [*naming him, or them*], offers to allow judgment to be taken against him [*or*, against the defendant herein] by the plaintiff, for [*here specify the sum or property, or specific relief intended*] with costs.

[*Date.*]

[*Signature of defendant or his attorney.*]

[*Address to plaintiff's attorney.*]

2381. Notice of acceptance thereof.

[*Title.*]

Take notice that the plaintiff accepts the offer of the de-

[1] Wis. Stats. 1913 sec. 2789, 2790; Ariz. R. S. 1913 sec. 637; Ark. Dig. of Stats. 1904 sec. 6277; Cal. C. C. P. 1906 sec. 997; Colo. Code Ann. 1911 sec. 312; Idaho Rev. Codes 1908 sec. 4870; Iowa Ann. Code 1897 sec. 3819, 3820; Kans. Gen. Stats. 1909 sec. 6142; Mont. Rev. Codes 1907 sec. 7137; Minn. Gen. Stats. 1913 sec. 4196; Mo. R. S. 1909 sec. 1965; Neb. R. S. 1913 sec. 7722, 7723; N. Dak. Rev. Codes 1905 sec. 7238, 7239; S. Dak. C. C. P. 1908 sec. 472–475; Okla. Comp. Laws 1909 sec. 6054; Oregon Laws 1910 sec. 532; Utah Comp. Laws 1907 sec. 3217; Wyo. Comp. Stats. 1910 sec. 4472.

fendant dated ....., 19.., allowing him to take judgment in this action [for ..... dollars] with costs.

[*Date.*]

[*Signature of plaintiff's attorney.*]

[*Address to defendant's attorney.*]

2382. Affidavit to enter judgment thereon.

[*Title.*]

[*Venue.*]

E.... F...., being duly sworn, says that he is the attorney for the plaintiff in the above entitled action, and that the annexed offer to allow judgment, made by the defendant, was served on him on the .... day of ..... last; and that within ten days thereafter, to-wit, on the .... day of ..... last, he served upon the defendant's attorney, G.... H...., Esq., the foregoing notice that plaintiff accepted the same, by delivering to and leaving with said G.... H.... personally a true copy of the said last named notice, at the office of the said G.... H.... in the city of .... county of .... aforesaid.

E....F....

[*Jurat.*]

2383. Judgment thereon.

[*Title.*]

This action having been commenced by due personal service of summons on the defendant C.... D...., on the .... day of ....., 19.., and the said defendant L.... M.... having appeared, and said defendants having offered in writing to allow the plaintiff to take judgment against them for [*state the judgment offered*], which offer the plaintiff, within ten days thereafter, duly accepted in writing; now, on motion of M.... N...., plaintiff's counsel:

IT IS ADJUDGED that said plaintiff recover of said defendants ..... dollars [*or other relief, according to the offer*], with ..... dollars costs and disbursements, making together the sum of ..... dollars.

Dated ....., 19..

By the Court:

N.... O...., Clerk.

[*If the statute requires entry of judgment by the court, the requirement must be followed.*]

2384. Offer to liquidate damages (served with answer).

[*Title.*]

The defendant hereby offers that if he fail in his defense in this action the plaintiff's damages be assessed at the sum of ..... dollars.

[*Signature of the defendant, or his attorney.*]

[*Address to plaintiff's attorney.*]

2385. Notice of acceptance thereof.

[*Title of cause.*]

Take notice that the plaintiff hereby accepts the offer of the defendant, that if he fail in his defense in this action, the damages of the plaintiff be assessed at the sum of ..... dollars.

[*Date.*]

[*Signature of plaintiff's attorney.*]

[*Address to defendant's attorney.*]

PART V

FORMS RESPECTING TRIAL AND EVIDENCE

CHAPTER CXXXI.

PROCEEDINGS TO OBTAIN INSPECTION OF PRIVATE WRITINGS OR ADMISSION OF GENUINESNESS.

2386. Petition for inspection and copies. (Wisconsin).
2387. Order for inspection and copies, or to show cause. (Wisconsin).
2388. Order absolute, for inspection and copies, after decision of motion upon order to show cause.
2389. Demand for inspection and copy. (Nebraska).
2390. Petition for production and inspection. (Iowa and Nebraska).
2391. Rule thereon. (Iowa and Nebraska).
2392. Notice requesting admission of genuineness of documentary evidence.
2393. Admission thereunder.
2394. Stipulation to admit documents.
2395. Short form; admission by one party.
2396. Stipulation to admit facts.
2397. Notice to produce at trial.
2398. Notice of motion for order for inspection of documents and for a copy.
2399. Affidavit on which foregoing motion is based.
2400. Demand for inspection of an original instrument set forth in complaint.

The statutes giving the right to inspection and copies of papers or books in the possession of the opposite party are quite similar in the various states.[1] Certain of the states also have provisions requiring an admission of the genuineness of a writing material to the action when exhibited to the adverse party before the trial, on pain of paying the expense of proving its genuineness.[2]

[1] Wis. Stats. 1913 sec. 4183; Ariz. R. S. 1913 sec. 1759; Cal. C. C. P. 1906 sec. 449, 1000; Colo. Code Ann. 1911 sec. 389; Idaho Rev. Codes 1908 sec. 4875; Iowa Ann. Code 1897 sec. 4654, 4655; Kans. Gen. Stats. 1909 sec. 5960; Mont. Rev. Codes 1907 sec. 7138; Minn. Gen. Stats. 1913 sec. 8447; Mo. R. S. 1909 sec. 1948; Neb. R. S. 1913 sec. 7960, 7961; N. Dak. Rev. Codes 1905 sec. 7243; S. Dak. C. C. P. 1908 sec. 477; Okla. Comp. Laws 1909 sec. 5888; Oregon Laws 1910 sec. 533; Utah Comp. Laws 1907 sec. 3474; Wash. Rem. and Bal. Code 1910 sec. 1262; Wyo. Comp. Stats. 1910 sec. 4587.

[2] Wis. Stats. 1913 sec. 4184; Kans. Gen. Stats. 1909 sec. 5959; Mo. R. S. 1909 sec. 1949; Neb. R. S. 1913 sec. 7959; N. Dak. Rev. Codes 1905 sec. 7242; S. Dak. C. C. P. 1908 sec. 476; Okla. Comp. Laws 1909 sec. 5887; Utah Comp. Laws 1907 sec. 3473; Wyo. Comp. Stats. 1910 sec. 4585.

2386. Petition for inspection and copies (Wisconsin).

[*Title.*]

To the ..... court [*or*, To the Hon. L.... M...., Judge, etc.]

THE PETITION of C.... D.... respectfully shows that he is the defendant in the above entitled action; that this action was commenced on the .... day of ....., 19.., by the personal service of the summons and complaint on this defendant, and that the defendant duly answered said complaint on the .... day of ....., 19.. [*or otherwise state condition of the action according to the fact.*]

That this action is brought by the plaintiff [*here state briefly the nature of the action, e. g.:* for money alleged to have been lent by said plaintiff to the said defendant, at his request; *or*, for money alleged to have been paid by said plaintiff for the use of the said defendant, at his request; *or*, for money alleged to have been received by the said defendant for the use of said plaintiff].

That petitioner has fully and fairly stated the case in this action to G.... H...., Esq., his counsel, who resides at ....., and is advised by his said counsel, upon such statement, and verily believes that an inspection and copies of the following books and papers, and documents, which, as he is informed and believes, are now in the possession of or under the control of the plaintiff, and not of the defendant, are necessary to enable defendant to frame his answer herein [*or*, to prepare his case for trial], and that he cannot safely proceed to trial without such inspection and copies*.

That such inspection and copies are made necessary by the following facts [*here briefly state facts showing necessity and materiality of the books or writings, e. g.:* That during the negotiation for, and in making the agreement sued on, deponent wrote to the plaintiff several letters relating thereto, bearing date about the .... day of ....., 19.., respectively, which, or some of them, as deponent is informed and believes, constitute said agreement].

That none of said letters are in the possession or under the control of deponent, nor has he kept any copies of, or extracts from them.

That your petitioner has applied to the said plaintiff for permission to inspect and take a copy of said [*name the docu-*

ments or the entries in said books relating to said transactions], which said permission has been refused, and sworn copies of the same have been refused, by said plaintiff to the defendant.

That this is the only application which has been made in this behalf.

YOUR PETITIONER therefore prays that he be allowed to inspect said [*specify what*] and to take a copy thereof; or that a sworn copy [*or* copies] thereof be delivered to him, according to law and the rules and practice of this court, in such time and manner and under such conditions as may seem proper; and for such other or further relief as may be proper.

C.... D....

[*Add verification as in Form 2324.*]

2387. Order for inspection and copies, or to show cause (Wisconsin).

[*Title.*]

Upon the petition of C.... D...., defendant in this action, of which a copy is hereto annexed, and upon the pleadings and proceedings in this action; on motion of G.... H...., Esq., attorney for the defendant,

ORDERED that the plaintiff be required to give to the defendant inspection and a sworn copy of [*name and describe document or book*]; or permission to take such copies in the following mode, namely, that the plaintiff deposit said [*name document or book*] with the clerk of this court in his office in the court house, on the .... day of ....., 19.., on or before .... o'clock noon, such deposit to continue until the .... day of ....., 19.., at .... o'clock .... noon, during which period the defendant is at liberty to inspect or take such copies. [*Or the order may be:* That the plaintiff deliver to the defendant sworn copies of said books and papers, on or before the .... day of ....., 19.., at .... o'clock .... noon, on condition, nevertheless, that the defendant pay or tender to the attorney for the plaintiff, before such time of delivery ..... dollars, to cover the expense of making such copies and their delivery; *or the condition may be:* That the defendant deposit with the clerk of this court the sum of ..... dollars and notify plaintiff's attorney of such deposit, out of which the clerk shall tax the reason-

able costs and expenses of making and delivering such copies, *or such other conditions as the court or judge deems proper.*]

Or, that the said plaintiff show cause to the contrary, before me, at my chambers, in the court house in ..... on the .... day of ....., 19.., at .... o'clock A. M. [*or,* before the court at a regular term, on the .... day of ....., 19.., at ....., etc.]

Let a copy of this order and the petition on which it is founded, be served on the attorneys for said plaintiff .... days before the date last mentioned.

This order shall operate as a stay of proceedings to this extent only, namely [*here specify how far the proceedings shall be stayed, if it is desired not to make a full stay*].

[*Date.*]

[By the Court:]

L.... M...., Circuit Judge.

[*The foregoing petition and order are adapted for use in Wisconsin, under Rule XVIII, Circuit Court Rules. In Iowa the petition must state the facts expected to be proved by the books or papers, etc., how and wherein they are material. In Nebraska there must first be a written demand, which if not complied with may be followed by an order: the making of this demand, and the failure to comply should be alleged in the petition.*]

2388. Order absolute, for inspection and copies, after decision of motion upon order to show cause.

[*This order may substantially follow the form immediately preceding, omitting the provisions requiring the showing of cause. It does not seem necessary to repeat the same.*]

2389. Demand for inspection and copy (Nebraska).

[*Title.*]

Take notice that C.... D.... the defendant above named hereby demands of the plaintiff above named an inspection and copy or permission to take copy of that certain deed [*or other instrument or book, describing the same with such particularity as to enable the other party to distinguish it*], which said [*name instrument or book*] is in the possession and

under control of the plaintiff and contains evidence relating to the merits of the defense in this action.

[*Date.*]

C.... D....

To A.... B...., Esq., Plaintiff,
and E.... F...., Esq., his Attorney.

2390. Petition for production and inspection (Iowa and Nebraska).

[*Follow the first form in this chapter to the * and continue*]: That said deed [*or other paper or book*] is material to the just determination of this action in this, that [*state facts showing its materiality*] and that the defendant expects to prove by said deed [*or other book or paper*] that [*set forth the facts expected to be proved*].

YOUR PETITIONER therefore prays that a rule be issued requiring the plaintiff to produce said deed [*or book*] for the purpose of being inspected and copied by the defendant, and of being used as evidence in his behalf, or that the said plaintiff show cause to the contrary.

[*Add verification.*]

C.... D....

2391. Rule thereon (Iowa and Nebraska).

The State of ..... to the Sheriff of ..... County,

GREETING: C.... D.... having filed his petition in a certain action pending in the district court of the state of .....in and for ..... county, wherein A.... B.... is plaintiff and C.... D.... is defendant, alleging that he believes a certain deed [*or book, describing same as in petition*] is now under the control of said plaintiff, and that the same is material to the just determination of said action.

YOU ARE HEREBY COMMANDED to make known to the said A.... B...., plaintiff aforesaid, that he produce said book [*or paper or deed*] in said court on the .... day of ....., 19.., for the purpose of being inspected and copied by the said defendant, or show cause to the contrary.

In witness whereof I have hereunto set my hand and affixed the seal of said court this .... day of ....., 19..

[SEAL.] L.... M...., Clerk.

2392. Notice requesting admission of genuineness of documentary evidence.

[*Title.*]

Take notice that the undersigned proposes to adduce in evidence upon the trial the document [*or* the several documents] hereto annexed and exhibited to you, and that you are requested to give an admission in writing of the genuineness of the same [respectively].

[*Date.*]

[*Address.*] [*Signature.*]

2393. Admission thereunder.

[*Title.*]

I hereby make the admission above requested [*and where a part of several documents are admitted, add:* so far as relates to the bond annexed, and refuse to make any other admission].

[*Date.*] [*Signature.*]

2394. Stipulation to admit documents.

[*Title.*]

It is hereby stipulated and agreed that the documents hereunder described [and to which we have respectively set our names on the first and last pages thereof] shall and may be admitted and read and used as evidence at the trial of this cause; and that such of the said documents as are described as copies or extracts shall be deemed and taken to be, and shall be used as, true copies or extracts, without further proving the same; and that such copies or extracts shall, and may be, read in evidence as primary and the best evidence, and not as secondary evidence; and that the original documents shall not be required to be produced, or any evidence as to the same, or of the proper custody thereof, or as to the non-production of the same; and no objection shall be taken to the reading as evidence the documents so marked, saving all just exceptions to the admissibility of the originals as evidence.

The following are the documents above referred to [*describing them, and referring to a figure or letter indorsed*].

[*Date.*]

[*Signatures.*]

2395. Short form; admission by one party.

[*Title.*]

For the purposes of the trial of this action, the due execution by the above-named defendant, and the genuineness of the annexed contract are hereby admitted; and the same may be read in evidence upon the trial of said action, without further proof.

[*Date.*] [*Signature.*]
Defendant's Attorney.

2396. Stipulation to admit facts.

[*Title.*]

It is hereby stipulated and agreed that the following facts are, and shall be, admitted by both parties for the purpose of, and on, the trial of this action [*here state the facts*].

[*Date.*]

[*Signatures.*]

2397. Notice to produce at trial.

[*Title.*]

TAKE NOTICE that you are hereby required to produce, on the trial of this cause [a certain, *here describe the paper sought; or, if there are several say*], the following described papers:

1. A deed bearing date on or about the .... day of ....., 19.., and executed, or purporting to be executed, between M....N.... and O.... P.... and to convey a farm in the town of .....

2. All books of account kept by M.... N.... in his business at ....., from the .... day of ....., 19.., to the .... day of ....., 19.., and containing entries relating to dealings between M.... N.... and O.... P....

Also other documents, letters, books, papers, and writings whatsoever, in your control, containing any entry, memorandum, or other matter in any wise relating to the matters in question in this cause.

And you are hereby notified that in case of your failure to produce the said [*describing the papers*] the defendant will

introduce secondary evidence of their contents on the trial of this action.

[*Date.*] G.... H...,
[*Address.*] Attorney for Defendant.

[*The most accurate description possible should be given of all documents desired.*]

2398. Notice of motion for order for inspection of documents and for a copy.[3]

[*Title.*]

To E.... F..., Attorney for Plaintiff.

TAKE NOTICE that upon the annexed affidavit of C.... D.... and upon the pleadings in this action heretofore served and filed, the undersigned will move said court, at ..... on ....., 19.., at the opening of court on that day or as soon thereafter as counsel can be heard, for an order requiring the plaintiff to give the defendant an inspection of a paper [*or* accounts, *or* entries] described as follows [*describe same*] relating to the transaction set forth in the complaint herein and which contains evidence relating to the defendants' defense in this action. The ground upon which this motion is based is that such inspection and copy are necessary for the defendant to have in order to properly make his defense herein.

Dated ....., 19.. G.... H...,
Defendant's Attorney.

2399. Affidavit on which foregoing motion is based.

[*Title.*]

[*Venue.*]

C.... D.... being duly sworn says that he is the defendant in this action, that [*insert affidavit of merit, if made necessary by statute, as in Form 2366*].

That the plaintiff has in his possession and under his control a certain book [*or* document] [*describing it*] containing entries and evidence relating to the transactions set forth in the complaint herein which are necessary for the defendant to inspect in order to properly make his defense

[3] This form and the following may be used in states where there is no special provision, either by statute or rule, as to the manner in which inspection is to be obtained.

herein. That the defendant has duly requested the plaintiff in writing to give the defendant such inspection and permission to take a copy thereof which request the plaintiff wholly refused.

C.... D....

[*Jurat.*]

[*Add affidavit of the defendant's attorney to the effect that inspection of the book or document is necessary in order that the defendant may make his defense.*]

2400. Demand for inspection of an original instrument set forth in complaint.

[*Title.*]

To E.... F...., Attorney for Plaintiff.

DEMAND is hereby made for inspection of the original [*name instrument*] a copy of which purports to be attached to the complaint herein; such inspection is desired for the purpose of controverting the genuineness [*or*, the due execution *or otherwise state the purpose*] of the said instrument.

Dated ....., 19..

G.... H....,
Defendant's Attorney.

CHAPTER CXXXII.

PROCEEDINGS TO OBTAIN EXAMINATION OF ADVERSE PARTY.

2401. Notice of examination.
2402. Affidavit to accompany notice, when examination is required before issue joined.
2403. Notice of motion to further limit the examination.
2404. Order limiting the subjects of examination.

The forms given in this chapter are for use in Wisconsin under the provisions of Wis. Stats. 1913, sec. 4096. Provisions somewhat similar are contained in the codes of Kansas, North Dakota and South Dakota. Kans. Gen. Stats. 1909, sec. 5933; N. Dak. Rev. Codes 1905, sec. 7244 *et seq.*; S. Dak. C. C. P. 1908, secs. 478-485.

2401. Notice of examination.

[*Title.*]

TAKE NOTICE that the deposition of A.... B...., the above-named defendant [*or* president, *or other officer, or employee* of the defendant corporation, *according to the fact*] will be examined in this action, and his deposition taken at the instance of the defendant, under the provisions of Wis. Stats. 1898 sec. 4096, as amended, on the .... day of ....., 19.., at .... o'clock in the forenoon, before O.... P...., Esq., court commissioner [*or*, Hon. L.... M...., circuit, judge], at his office [*or* chambers], to-wit, No. .... in ..... street, city of .....

[*Date.*] E.... F....,

[*Address.*] Plaintiff's Attorney.

[*The party whose deposition is to be taken must be subpoenaed, and his fees paid or tendered, or he will not be obliged to attend.*]

2402. Affidavit to accompany notice, when examination is required before issue is joined.

[*Title.*]
[*Venue.*]

A.... B...., being first duly sworn, says that he is the plaintiff in this action; that the general nature and object of the action [*here state same*]; that discovery is necessary and is sought by the examination of the defendant as to certain facts within the knowledge of the defendant, and not within the plaintiff's knowledge, in order to enable the plaintiff to prepare his complaint herein.

That the points on which such discovery is desired are as follows [*here state the points distinctly*].

A.... B....

[*Jurat.*]

[*This affidavit must accompany the notice if the examination is applied for, before joining of issue.*]

2403. Notice of motion to further limit the examination.

[*Title.*]

SIR: Please take notice that the undersigned will move the court, at the court-room [*or*, the Hon. J.... K...., presiding judge, at his chambers], in the court house in [*state where*], on the .... day of ....., 19.., at ... o'clock in in the .... noon, to limit the subjects of examination of said defendant, under the notice and subpoena heretofore served on him in this action.

[*Date.*] G.... H....,
[*Address.*] Defendant's Attorney.

2404. Order limiting the subjects of examination.

[*Title.*]

The plaintiff having given notice of the examination of the defendant to be taken on the [*give date*], and subpoenaed said defendant to appear and be examined at the instance of the plaintiff, and, by his affidavit served with such notice having stated the points on which such discovery is desired, to be as follows [*here state them*]. And the defendant having moved on due notice to further limit the subjects to which such examination shall extend, and such motion coming on

to be heard, and after hearing L.... M...., Esq., defendant's attorney for the motion, and O.... P...., plaintiff's attorney, opposing:

ORDERED, that the subjects of said examination be limited as follows [*here specify the points as the judge directs*].

[*Date.*]

L....M ...., Presiding Judge.

[*The form of the deposition and the certificate thereto may be readily adapted from Forms 2408 and 2409.*]

CHAPTER CXXXIII.

FORMS RELATING TO DEPOSITIONS.

2405. Notice of taking deposition within state. (Wisconsin.)
2406. The same, without the state. (Wisconsin.)
2407. Stipulation for taking deposition without further notice. (Wisconsin.)
2408. Form of deposition taken upon notice. (Wisconsin.)
2409. Certificate to be attached to foregoing, statutory form. (Wisconsin.)
2410. Interrogatories for issuance of commission. (Wisconsin.)
2411. Notice of issuing commission upon foregoing interrogatories. (Wisconsin.)
2412. Cross interrogatories with proposal of additional commissioner. (Wisconsin.)
2413. Commission to take deposition. (Wisconsin.)
2414. Deposition on commission and return of commissioners. (Wisconsin.)
2415. Notice of filing of deposition taken on notice. (Wisconsin.)
2416. Notice of return and filing of commission. (Wisconsin.)
2417. Notice of motion to suppress deposition. (Wisconsin.)
2418. Order suppressing deposition. (Wisconsin.)
2419. Affidavit on which to apply to a justice for the taking of testimony of witnesses within the state. (Minnesota.)
2420. Order by justice for taking deposition within the state. (Minnesota.)
2421. Notice of taking of deposition without the state. (Minnesota.)
2422. Notice of taking deposition within the state. (Minnesota.)
2423. Stipulation for the taking of a deposition. (Minnesota.)
2424. Certificate to deposition taken under notice, order or commission. (Minnesota.)
2425. Affidavit on which to apply for commission. (Minnesota.)
2426. Notice of application for commission. (Minnesota.)
2427. Order for issuance of commission.
2428. Interrogatories and cross-interrogatories for deposition taken on commission. (Minnesota.)
2429. Notice of settlement of interrogatories. (Minnesota.)
2430. Commission to take deposition. (Minnesota.)
2431. Return and certificate of commissioner upon taking deposition. (Minnesota.)
2432. Notice of motion to suppress and order thereon. (Minnesota.)
2433. Notice of taking deposition. (Iowa.)
2434. Notice of issuing of commission. (Iowa.)
2435. Interrogatories to accompany the foregoing notice. (Iowa.)
2436. Cross-interrogatories to be filed by clerk, if none be

filed by adverse party. (Iowa.)
2437. Commission to take deposition. (Iowa.)
2438. Agreement to take deposition. (Iowa.)
2439. Caption for depositions, general form. (Iowa.)
2440. Certificate to depositions.
2441. The same, by stenographer.
2442. Authentication of official character, if taken before officer having no seal. (Iowa.)
2443. Notice by clerk of filing of deposition. (Iowa.)
2444. Notice to take deposition. (Nebraska.)
2445. Commission and return. (Nebraska.)
2446. Caption and certificate to depositions taken on notice or agreement.
2447. Depositions. (North Dakota and South Dakota.)
2448. Certificate of officer. (South Dakota.)
2449. Affidavit for examination of witness. (California.)
2450. Notice of taking deposition. (California.)
2451. Order shortening time of notice.
2452. Affidavit for issuance of commission for witness in another state. (California.)
2453. Notice of motion for commission. (California.)
2454. Notice of taking deposition of resident witness. (Colorado.)
2455. Affidavit accompanying above notice.
2456. Notice and interrogatories for issuance of commission for non-resident witness. (Colorado.)
2457. Commission to take testimony upon interrogatories (Colorado.)
2458. Notice of taking of depositions. (Missouri.)
2459. Notice to take depositions. (Oklahoma.)

The codes generally provide for the taking of depositions either on oral interrogatories after notice or on written interrogatories under a commission issued by the Court. Inasmuch as blanks are universally provided for the various papers used it has not been deemed necessary to expand the Chapter materially. The statutes bearing on the subject in the various states are cited in the note.[1]

[1]Wis. Stats. 1913 sec. 4086 *et seq.*; Ariz. R. S. 1913 sec. 1689 *et seq.*; Ark. Dig. of Stats. 1904 sec. 3156 *et seq.;* Cal. C. C. P. 1906 sec. 2019 *et seq.*; Colo. Code Ann. 1911 sec. 375 *et seq.;* Idaho Rev. Codes 1908 sec. 6059 *et seq.;* Iowa Ann. Code 1897 sec. 4672 *et seq.;* Kans. Gen. Stats. 1909 sec. 5943 *et seq.;* Minn. Gen. Stats. 1913 sec. 8381 *et seq.;* Mo. R. S. 1909 sec. 6384 *et seq.;* Neb. R. S. 1913 sec. 7938 *et seq.*; N. Dak. Rev. Codes 1905 sec. 7271 *et seq.;* S. Dak. C. C. P. 1908 sec. 509 *et seq.;* Okla. Comp. Laws 1909 sec. 5866 *et seq.;* Oregon Laws 1910 sec. 835 *et seq.*; Tex. Civ. Stats. Ann. 1913 art. 3649 *et seq.;* Utah Comp. Laws 1907 sec. 3449 *et seq.;* Wash. Rem. and Bal. Code 1910 sec. 1231 *et seq.;* Wyo. Comp. Stats. 1910 sec. 4561 *et seq.*;

2405. Notice of taking deposition within state (Wis. Stats. 1913 secs. 4100 et seq.).

STATE OF WISCONSIN.
In .... Court .... County.

A.... B...., Plaintiff, vs. C.... D...., Defendant.	Notice of taking deposition.

SIR: Please take notice that the deposition of L.... M.... will be taken before O.... P...., Esq., a court commissioner [*or*, notary public, *or*, justice of the peace], in and for said county, at his office, No. .... street, in the town [*or* village, *or*, city] of ..... in ..... county, on the .... day of ....., 19.., at .... o'clock in the forenoon of said day, to be used upon the trial of the above entitled action on the part of the plaintiff [*or*, defendant].

The cause for taking same is that the said L.... M.... lives at ..... in ..... county, more than thirty miles from the place of trial of said action [*or*, beyond the reach of the subpoena of the court], [*or*, that said L.... M.... is about to go out of the state, not intending to return in time for the trial of said action], [*or*, that the said L.... M.... is so sick, *or* infirm, *or* aged, as to make it probable that he will not be able to attend at the trial of said action], [*or*, that the said L.... M.... is a member of the legislature of Wisconsin, which is now in session, and he has waived his privilege].

[*Date.*]

G.... H....,
Attorney for .....

To E.... F..., Esq.,
Attorney for .....

2406. The same, without the state (Wisconsin).

[*For use without the state the notice may follow the last preceding form substantially, save that a number of the reasons for taking a deposition within the state are not applicable.*]

2407. Stipulation for taking deposition without further notice (Wisconsin).

STATE OF WISCONSIN.
.... Court ..... County.

A.... B...., Plaintiff, vs. C.... D...., Defendant.	Stipulation.

It is hereby stipulated and agreed that the deposition of L.... M...., a witness for the plaintiff [*or*, defendant] in the above entitled action be taken before O.... P...., Esq., a [*giving official title*] at his office in [*give location of office*] on the .... day of ....., 19.., at .... o'clock in the .... noon, and that no further or other notice of the taking of said deposition need be given.

[*Date.*]

E.... F...., Plaintiff's Attorney.
G.... H...., Defendant's Attorney.

2408. Form of deposition taken upon notice (Wisconsin).

[*Venue.*]

DEPOSITION of L.... M...., a witness taken before me at my office in the city of ..... in said county, on the .... day of ....., 19.., pursuant to the annexed notice [*or* stipulation] to be used on the part of the plaintiff [*or*, defendant] in a certain action now pending in the ..... court for ..... county, state of Wisconsin, wherein A.... B.... is plaintiff and C.... D.... is defendant.

The said witness being first duly sworn by me to testify the truth, the whole truth and nothing but the truth relative to said action, in answer to oral interrogatories propounded by E.... F.... who appeared for the plaintiff, deposed and made answer as follows:

My name is L.... M....; my age is .... years. I reside and have since [*give time*] resided at ..... I know the parties to the action mentioned.

Question. [*Here write out question in full.*]

Objected to by defendant on the ground [*state ground given*].

Answer. [*Give answer.*]

Upon cross-examination the witness testified as follows:

[*Here follow with cross-examination and re-examination, if any, in the same manner as with direct examination.*]

[*Upon concluding let the witness read over the testimony and make all corrections which he desires at the foot of the whole deposition, and then let him sign at the end of the whole.*]

O.... P.... [*official title.*]

2409. Certificate to be attached to foregoing, statutory form (Wis. Stats. 1913 sec. 4106).

I, O.... P.... [*add official designation*], in and for said county, do hereby certify that the above described deposition was taken before me at my office, in the town of ..... in said county, on the .... day of ....., at .... o'clock, ... noon; that it was taken at the request of the plaintiff [*or*, defendant, *or other person procuring it*] upon verbal [*or* written] interrogatories; that it was reduced to writing by myself [*or* by deponent, *or* by L.... M...., a disinterested person, in my presence and under my direction]; that it was taken to be used in the action of A.... B.... v. C.... D.... now pending in the ..... court [*or to be used in some proceeding or matter, mentioning it*]; and

That the reason for taking such deposition was [*here state the true reason*]; that C.... D.... attended at the taking of such deposition [*or:* that a notice of which the annexed is a copy was served upon C.... D.... on the .... day of ....., 19.., *or*, that the deposition was taken in pursuance of the annexed stipulation]; that said deponent before examination was sworn to testify the truth, the whole truth, and nothing but the truth, relative to said cause; and that said deposition was carefully read to [*or* by] said deponent, and then subscribed by him.

O.... P....,

[*Add official designation.*]

2410. Interrogatories for issuance of commission (Wis. Stats. 1913 secs. 4113, 4114 and circuit court rule XVII).

STATE OF WISCONSIN.
.... Court ..... County.

A.... B....,
Plaintiff,
vs.
C.... D....,
Defendant.

INTERROGATORIES to be propounded to L.... M...., Esq., of the city of ....., county of ....., and state of ....., a witness to be produced, sworn and examined on the part of the above-named plaintiff [*or* defendant] under a commission to be issued out of and under the seal of the court, and directed to O.... P...., Esq., of the city of ....., county of ....., and state of ....., and to such other person as may be named commissioner on the part of the defendant [*or*, plaintiff] above-named.

First interrogatory. What is your name, age, residence and occupation?

Second interrogatory. Do you know the parties to the above entitled action, or either of them, and if yea, how long have you known such parties or party?

[*Continue with the questions, numbering each, and add the following final question*]:

Last interrogatory. Do you know or can you state any matter or thing that may tend to the benefit or advantage of either or any of the parties to this action? If yea, state the same fully and at large in your answer hereto, as if specially interrogated.

E.... F....,
Plaintiff's Attorney.

2411. Notice of issuing commission upon foregoing interrogatories (Wis. Stats. 1913 sec. 4114).

STATE OF WISCONSIN.
.... Court, ... County.

A... B....,
Plaintiff,
vs.
C.... D....,
Defendant.

SIR: Take notice that at the expiration of ten days from the date of the service of this notice upon you, a commission will be issued out of said court to take the deposition of L.... M...., of the city of ....., county of ....., and state of ....., upon certain interrogatories, of which a copy is herewith served upon you, and such cross-interrogatories as may be duly served and filed herein, before O.... P...., Esq., the commissioner named in the caption to said interrogatories; that the reason for which said deposition is to be taken is that the said L.... M.... is a necessary and material witness for said A.... B.... on the trial of said action, and is not a resident of the state of Wisconsin, but resides in the .... of ....., county of ....., and state of ..... [*or when taken before issue:* that the said L.... M.... is so sick, infirm and aged as to afford reasonable ground to apprehend that he may die or become unable to give his testimony on the trial of this action, *or* that said L.... M.... is about to remove to the state of ....., so that he cannot be present nor give his testimony on the trial of this action, *or state any other reason which may exist*].

[*Date.*]

E.... F....,
Plaintiff's Attorney.

To G.... H...., Esq.,
Defendant's Attorney.

2412. Cross interrogatories with proposal of additional commissioner (Wis. Stats. 1913 sec. 4114).

[*Title.*]

CROSS INTERROGATORIES to be propounded to L.... M...., of ....., county of ....., state of ....., before O.... P...., Esq., of ....., a commissioner to be appointed to take the deposition of said witness on behalf of the plaintiff, and also Q.... R...., Esq., of ....., an additional commissioner whom the defendant now proposes to act with said O.... P...., the said deposition to be

used upon the trial of the above entitled action on the part of the plaintiff [*or defendant*].

First interrogatory. [*Insert and number all the interrogatories.*]

G.... H....,
Defendant's Attorney.

2413. Commission to take deposition (Wis. Stats. 1913 secs. 4113–4115 and circuit court rule XVII).

[*Title.*]

The State of Wisconsin, to O.... P...., of the .... of ....., county of ....., and state of .....

Whereas, it appears unto our judge of our circuit court, for ..... county, state of Wisconsin, that Y.... Z...., of the .... of ....., county of ....., and state of ....., is [*or* are] [a] material witness[es] in a certain cause now pending in our said ..... court, between A.... B...., plaintiff, and C.... D...., defendant, and that the personal attendance of said witness[es] cannot be procured at the trial of said cause:

And whereas we, in confidence of your prudence and fidelity, have appointed you, and by these presents do appoint you [a] commissioner[s] to examine the said witness[es].

NOW THEREFORE, we do authorize and empower you, at a time and place to be fixed by you, diligently to examine the said witnesses on the interrogatories and cross-interrogatories attached to this commission, on his [*or* their] corporal oath[s] first taken before you, and cause the said examination of such witness[es] to be reduced to writing and signed by such witness[es] and by yourself [*or* selves], and then return the same, annexed to the said commission, unto our court aforesaid with all convenient speed, enclosed under the seal of you, the said commissioner[s].

Witness, the Honorable J.... K...., judge of the ..... court of ..... county, state of Wisconsin, at the .... of ....., county of ....., and state of Wisconsin, this .... day of ....., 19..

C.... K...., Clerk.

L.... M....,
..... Attorney.

[*Venue.*]

I, C.... K...., clerk of said court, do hereby certify that the interrogatories and cross-interrogatories attached and referred to in the within commission, are the originals, as the same were filed in my office in the action herein entitled.

Witness, my hand and the seal of the ..... court of ..... county, at the .... of ....., county of ....., and state of Wisconsin, this .... day of ..... 19..

[SEAL.]

C.... K...., Clerk.

[*The following sections of the statutes and rules of court are usually printed on the back of the commission for the convenience of the commissioners*]:

Wis. Stats. 1913 sec. 4115. The commissioner named in the direct interrogatories shall fix the time and place for executing the commission, and give the other commissioner, if any, one day's notice thereof, when he resides in the same place, and when not, one day's notice in addition for every thirty miles of distance between the place of his residence and the place fixed for executing the commission. If the notice be by mail double time shall be allowed; but notice may be waived in writing or by appearance at the execution of the commission. If there be two commissioners, the place for executing the commission shall be fixed in the county where they reside, unless they agree upon another. The commissioner named in the direct interrogatories shall have charge of and return the deposition.

Rule XVII, sec. 4. At the time and place fixed for executing the commission the commissioner or commissioners shall proceed to execute such commission in accordance with section 4115 Statutes of 1913, and sections 4, 5 and 6 of this rule, copies whereof shall be transmitted with the commission for their instruction. If either of the commissioners shall not attend at the time and place so fixed, the other may proceed to execute the same with like effect as if both were present; but he must certify in his return that the commissioner so absent had due notice of the time and place of executing the same, and that he failed to attend pursuant thereto.

Sec. 5. The commissioner or commissioners shall proceed to execute the same as follows: The commissioners, or one of them, shall publicly administer an oath or affirmation to each witness named in the commission, that the answers which he shall make to each of the interrogatories propounded to him shall be the truth, the whole truth, and nothing but the truth. Each interrogatory, direct and cross, shall be propounded to him, and his answer thereto be correctly reduced to writing, and with any exhibit thereto be annexed to and returned with the commission. Each witness shall subscribe his name at the end of his answers to the interrogatories and the commissioner or commissioners shall subscribe his or their names at the foot of each page of the testimony. If any exhibit is produced and proved or referred to in the answer of any witness, it shall be marked as an exhibit by some convenient designation, either by letter or number, by the

commissioners, or one of them, and be referred to in the testimony of the witness, and shall be annexed to and returned with the deposition. If the paper be a record or other document not in the control of the party or the commissioner, it shall be sufficient to annex a copy, stated by the witness in his answers to be a true copy thereof. The commissioner or commissioners shall certify in their return that each witness, before giving his evidence, was duly sworn or affirmed, and shall also state the time when the testimony was taken. The return of the commissioner or commissioners shall be indorsed on the commission.

Sec. 6. The proper commissioner shall inclose the answers to all the interrogatories and exhibits in a suitable envelope, which shall be properly sealed, and direct the same to the clerk of the court from which the commission issued, at his place of office, with the title of the action indorsed thereon, and the package shall be immediately transmitted to him by mail or express, the expense thereof to be returned and collected with the commissioner's fees in the action.

2414. Deposition on commission and return of commissioners (Wisconsin).

[*Venue.*]

Deposition of witness[es] produced and sworn [*or* affirmed] and examined on the .... day of ....., 19.., at ..... in said county, upon the annexed interrogatories and cross-interrogatories, under the annexed commission issued out of the ..... court for the county of ....., in the state of Wisconsin, in an action pending in said court wherein A.... B.... is plaintiff, and C.... D...., defendant, to be used on the trial thereof, on the part of the plaintiff [*or*, defendant].

L.... M...., being first duly sworn [*or* affirmed] according to the directions hereto annexed, deposes and says as follows:

To the first interrogatory he says [*insert answer*].

To the second interrogatory he says [*insert answer and so continue*].

[*Let each witness read over and sign his testimony, and let the commissioner sign at the foot of each page.*]

[*Venue.*]

I, O.... P...., commissioner named in the annexed commission, do hereby certify that the above deposition was taken before me, at my office in the .... of ....., in said county, on the .... day of ....., 19.., at .... o'clock in the .... noon, under the annexed commission;

That it was taken at the request of the plaintiff [*or*, defendant] upon the written interrogatories and cross-interrogatories, attached to said commission, and hereunto;

That it was reduced to writing by myself [*or*, by Q.... R...., a disinterested person, in my presence and under my direction];

That it was taken to be used in the action wherein A.... B.... is plaintiff and C.... D...., defendant, now pending in the ..... court of ..... county, and that the reason for taking it was [*here state reason as set forth in the caption to the interrogatories*];

That said deponent[s] before examination was [*or* were] sworn to testify the truth, the whole truth, and nothing but the truth, relative to said cause; and

That said deposition after having been taken was carefully read to [*or* by] said deponent, and then subscribed by him.

[*Signature of commissioner with official designation.*]

2415. Notice of filing of deposition taken on notice (Wisconsin).

[*Title.*]

To G.... H...., Esq.,

Attorney for the defendant above named:

SIR: Please take notice that the deposition of L.... M...., a witness produced, sworn and examined on behalf of the plaintiff above named, before O.... P...., a ..... in and for the county of ..... and state of ....., and a person by law authorized to take depositions, taken pursuant to the notice hereinbefore served [*or*, stipulation hereinbefore entered into], has been duly certified to and returned by said officer to the clerk of the ..... court of ..... county, and has been filed in the office of said clerk, and that said A.... B.... will claim the right to use said deposition on any trial of said action that may be had.

[*Date.*]

E.... F....,
Attorney for Plaintiff.

2416. Notice of return and filing of commission (Wisconsin).

[*Title.*]

To G.... H...., Esq.,

Attorney for defendant above named:

SIR: Please take notice that the commission heretofore,

to-wit, on the .... day of ....., 19.., issued in the above entitled action, under the seal of the above entitled court, to take the deposition of L.... M...., a witness to be produced, sworn, and examined on behalf of the plaintiff above named, has been duly executed and returned by the commissioner therein named, to the clerk of the ..... court of ..... county, and together with said deposition of said witness has been filed in the office of said clerk, and that said plaintiff will claim the right to use said deposition on any trial of said action that may be had.

[*Date.*] E.... F....,
Attorney for Plaintiff.

2417. Notice of motion to suppress deposition (Wisconsin).

[*Title.*]

SIR: Please take notice that upon the deposition of L.... M...., on file in this action [and upon the affidavit hereto annexed, *if an affidavit be made*], the [defendant] by his counsel will move the court, at, *etc.*, at the opening of court on that day or as soon thereafter as counsel can be heard, to suppress said deposition on the ground that [*here specify the grounds*].

[*Date.*] G.... H....,
Attorney for Defendant.

[*Address.*]

[*If no notice of filing or return has been given, or if the deposition has been returned so recently before the trial as not to give time for the making of a written motion, an oral motion to suppress may be made at the opening of the trial. In Minnesota a motion to suppress must be made within ten days after service of notice of the return of the deposition, otherwise defects and irregularities are waived. Minn. Gen. Stats. 1913 sec. 8393.*]

2418. Order suppressing deposition (Wisconsin).

[*Title.*]

The motion of the defendant above named to suppress the deposition of L.... M.... heretofore taken in this action, having come on to be heard before the court on this ....

day of ....., 19..; on reading and filing the affidavit of C.... D...., and upon the pleadings in said action and the said deposition, after hearing G.... H...., Esq., attorney for defendant, and E.... F...., Esq., attorney for the plaintiff; being now fully advised in the premises,

ORDERED, that the deposition of L.... M...., taken herein under commission, on the .... day of ....., 19.., before O.... P...., Esq., [commissioner], [*or designate officer*], be suppressed and be not received in evidence in this action.

That the plaintiff pay to the defendant ten dollars, the costs of this motion, within .... days from date

By the Court:

[*Date.*] J.... K...., Circuit Judge.

2419. Affidavit on which to apply to a justice for the taking of testimony of witnesses within the state (Minn. Gen. Stats. 1913 sec. 8381 et seq.).

[*Title.*]

[*Venue.*]

A.... B...., being duly sworn, says that he is the plaintiff in the above entitled action; that the same is a civil action and was commenced by the personal service of process on the defendant on the .... day of ....., 19.., [*or otherwise, according to the fact*], and is now pending in said court; that the following persons, viz. [*name them, with residences*], are each and all necessary and material witnesses on behalf of the plaintiff in the above entitled action, and that their testimony is wanted in said action by said plaintiff, and that said witnesses all live more than thirty miles from the place of trial of this action, to-wit [*state where they live*], [*or*, that said witnesses are about to go out of the state of Minnesota, and not to return until after the trial of this action, *or state other statutory cause*].

WHEREFORE plaintiff requests that the depositions of said witnesses be taken, as provided by law.

A.... B....

[*Jurat.*]

2420. Order by justice for taking deposition within the state (Minn. Gen. Stats. 1913 sec. 8382).

[*Title.*]

It appearing to the undersigned by the affidavit of A.... B.... that the above entitled action is a civil action, and that the same has been commenced and is pending in the above mentioned court, and that L.... M.... and O.... P...., of ....., in said state, are necessary and material witnesses on behalf of the plaintiff in such action, and that the testimony of said witnesses is wanted in such action by the plaintiff, and that their depositions should be taken, for the reason [*here state reason, as set forth in the affidavit*].

NOW THEREFORE, on application of said A.... B...., I, the undersigned, a justice of the peace within and for the county of ..... in the state aforesaid, do hereby appoint .... o'clock in the .... noon, on the .... day of ....., 19.., at ...., in the .... of ....., in said county of ....., and state aforesaid, as the time and place for taking the deposition of said witnesses.

It is further ordered that a copy of this order be served upon the said C.... D...., and E.... F...., Esq., his attorney, at least .... days before the time herein appointed for the taking of the said deposition.

[*Date.*]

Y.... Z...., Justice of the Peace in and for ..... County, Minn.

[*Venue.*]

I, the undersigned, a justice of the peace in and for the county and state aforesaid, do hereby certify that I have compared the foregoing copy of order with the original thereof, issued by me this day and now in my possession, and that such copy is a true and correct transcript of such original, and of the whole thereof.

In witness whereof, I have hereunto set my hand, this .... day of ....., 19..

Y.... Z....,
Justice of the Peace Aforesaid.

2421. Notice of taking of deposition without the state (Minn. Gen. Stats. 1913 secs. 8381, 8382).

[*Title.*]
[*Venue.*]

Take notice that the deposition of M.... N...., a witness in said action, on the part of the plaintiff, residing at the city of ..... in the state of ....., to be used on the trial of said action, will be taken by and before O.... P...., Esq., a [*give official title*] there residing and duly authorized by law to administer oaths therein, at his office, in the said city of ....., state of ....., on the .... day of ....., 19.., at .... o'clock in the .... noon of that day, and that said examination may be adjourned from day to day until the same is closed, and that the reason for taking said deposition is * that said witness is without the state of Minnesota.

[*Date.*]

E.... F....,
Attorney for Plaintiff.

To C.... D....,
Defendant Above Named.
And to G.... H...., Esq.,
His Attorney.

2422. Notice of taking deposition within the state (Minn. Gen. Stats. 1913 secs. 8381, 8382).

[*Proceed as in last preceding form to the* *, *and continue*]: that said witness lives more than thirty miles from the place of trial of this action, to-wit, at [*place of residence*]. [*Or*, that said witness is about to go out of this state not intending to return in time for the trial of this action, *or* that such witness is so sick, *or* infirm, *or* aged, as to make it probable that he will not be able to attend at the trial, *or* hearing].

[*Conclude as in last preceding form.*]

2423. Stipulation for the taking of a deposition (Minnesota).

[*Title.*]

IT IS HEREBY STIPULATED by and between the parties plaintiff and defendant in the above entitled action, that the deposition and testimony of E.... F...., residing at ..... in the state of ....., as a witness on behalf of said plaintiff, shall be taken by and before any notary public

residing at ....., whose official character as such notary public shall be sufficiently proven by his official seal and an impression thereof affixed to or stamped upon his return hereto; and such notary public is hereby agreed upon and appointed to take the deposition of said witness E.... F....

And the interrogatories and cross-interrogatories (if any) hereto attached shall go out with this stipulation, to be propounded to said witness after said witness is produced and sworn to testify the whole truth and nothing but the truth relative to said cause; and said parties hereby waive any and all objections to such notary public, and waive the issuing of any commission from said court herein, and hereby agree that said deposition of said witness E.... F...., shall have the same force and effect as if taken upon commission duly issued herein; and said parties waive any and all notices and prerequisite forms required by law or rules of court for the taking of depositions; but said parties reserve to themselves the right to object to the competency and admissibility of said interrogatories and cross-interrogatories, and to any of the same, and to any of the answers thereto respectively, in like manner and upon the same grounds as if said witness was present and orally examined in open court upon the trial of this cause which is at issue and in said court depending.

[*The following instructions are usually sent with the commission or notice for the convenience of the officer.*]

1st. The examination must commence at the place and within one hour from the time stated in the notice or stipulation, and the proceedings may be adjourned from day to day until the examinations are closed, except when the deposition is taken pursuant to stipulation, when the terms of the stipulation must be followed.

2d. Before examination, each witness must be sworn as follows:

"You do solemnly swear that the evidence you shall give relative to the cause now under consideration shall be the whole truth and nothing but the truth, so help you God."

3d. In making up the record, first give state, county, court and title of cause as found in the notice, stipulation or commission.

4th. Introduce the testimony of each witness as follows:

"Testimony of ....., in the county of ....., state of ....., taken before O..... P....., a....., by virtue of the notice (stipulation or commission as the case may be) hereto attached as stated in the return thereto."

5th. In case the deposition is taken under a commission and written interrogatories, do not copy the interrogatories, but before each answer add the following:

"To the first interrogatory the witness deposes and says,"
and proceed in like manner with the answer to each of the interrogatories.

6th. In case the deposition is taken under notice or stipulation without written interrogatories, the officer taking the deposition should write the question as it is put to the witness; then follow with the answer of the witness as given by him, and so on to the end of the deposition.

7th. The testimony of each witness when completed must be read over to him by the officer taking the same, when the witness may add to or qualify the same as he may desire.

8th. The witness must sign his name upon each piece of paper upon which any portion of his testimony is taken, and at the end of the deposition the witness must sign his name and the officer add jurat, as follows:

Subscribed and sworn to before me this.....day of ....19.....

O..... P.....,
(Title of Officer.)

9th. The notice, stipulation or commission, as the case may be, and the return, must be annexed to the deposition. The return should be in the following form.

State of.....}
County of.....} ss.

BE IT KNOWN, that I took the annexed deposition pursuant to the annexed notice; that I was then and there a ....; that I exercised the power of that office in taking such deposition; that by virtue thereof I was then and there authorized to administer an oath; that each witness before testifying was duly sworn to testify the whole truth and nothing but the truth relative to the cause specified in the annexed notice (stipulation or commission as the case may be); that the testimony of each witness was correctly read over to him by me before he signed the same; that the examination was conducted on behalf of the plaintiff by ....; that the examination was conducted on behalf of the defendant by ....; that the taking of said deposition was commenced at the time and place specified in the notice (stipulation or commission as the case may be).

Witness my hand and official seal, this..... day of ..... 19.....

O..... P.....,
(Title of Officer.)

10th. Form the papers into one package, fastened securely in the following order: Notice (stipulation or commission as the case may be), interrogatories and cross-interrogatories (if any), deposition, exhibits (if any) and return. Add a minute of the fees of officer and witness and by whom paid.

Inclose the package in an envelope addressed to.....
.....

Across the end of the envelope endorse "Deposition of .....
..... in case of ....,"

The package must be sent by mail directed as above, postage prepaid.

2424. Certificate to deposition taken under notice, order or commision (Minn. Gen. Stats. 1913 sec. 8388).

[*Venue.*]

Be it known that I took the annexed depositions pursuant

to the annexed notice [*or* order, *or* commission]; that I was then and there [*state official title*]; that I exercised the power of that office in taking such deposition; that by virtue thereof I was then and there authorized to administer an oath; that each witness, before testifying, was duly sworn to testify the whole truth and nothing but the truth relative to the cause specified in the annexed notice [*or* order]; that the testimony of each witness was carefully read over to him by me before he signed the same [*if the examination was oral*]; that the examination was conducted on behalf of the plaintiff by E.... F...., and on behalf of the defendant by G.... H.... and [*if the deposition was taken within the state*] that the reason for taking said deposition was [*here state reason*].

Witness my hand [and seal this .... day of ..... 19..

2425. Affidavit on which to apply for commission (Minn. Gen. Stats. 1913 sec. 8384).

[*Title.*]

[*Venue.*]

A.... B...., being duly sworn, says that he is the plaintiff in the above entitled action; that the same is a civil action commenced by the service of summons personally on defendant, on the .... day of ....., 19.. [*or otherwise, according to the fact*] and that the same is now pending in said court; that the time for answering the complaint herein has expired, and that defendant has not answered or demurred to said complaint [*or*, that issue of fact was joined in said action by service of an answer to said complaint on the .... day of ....., 19..; that one M.... N.... is a material witness in the prosecution of this action, whose testimony is desired by the plaintiff, and that said M.... N.... does not reside in this state, but resides in the city of ....., state of ....., and that his personal attendance on the trial of this action cannot be secured.

WHEREFORE affiant applies for the issuance of a commission out of this court to take the deposition of said M.... N...., as provided by law.

A.... B....

[*Jurat.*]

[*If issue has been joined in the action, eight days' notice of this application must be served on the adverse party.*]

2426. Notice of application for commission (Minn. Gen. Stats. 1913 sec. 8384).

[*Title.*]

SIR: Take notice that upon the affidavit of A.... B...., herewith served upon you, and upon the pleadings herein, heretofore served and filed, the undersigned will apply to the ..... court [*or judge, naming him*], at ..... [*state time and place*], for the issuance of a commission out of said court to take the testimony of M.... N...., of ....., state of ....., as a witness for the plaintiff in this action.

[*Date.*]

E.... F....,
Plaintiff's Attorney.

[*Address.*]

2427. Order for issuance of commission.

[*Title.*]

Upon the affidavit of A.... B...., filed herein, due notice having been given to the defendant's attorney, of the application for the issuance of a commission in this action to take the testimony of L.... M.... as a witness for the plaintiff,

ORDERED, that a commission issue out of this court to O.... P...., Esq., [*give title*], of ....., state of ....., to take the testimony of the said L.... M...., and return the same to this court.

[*Date.*]

Y.... Z...., Judge.

2428. Interrogatories and cross-interrogatories for deposition taken on commission (Minnesota).

[*These may substantially follow the forms heretofore given for use in Wisconsin. See Forms 2410 and 2412.*]

2429. Notice of settlement of interrogatories (Minnesota; rule XXX, rules district court).

[*Title.*]

To G.... H...., Esq., Attorney for the Defendant:

TAKE NOTICE that on the .... day of ....., 19.., at o'clock A. M., the undersigned will apply to Hon. J.... K...., Judge, etc., at his chambers in ..... [*or*, to the ..... court, at the courthouse, etc.], for settlement of the interrogatories and cross-interrogatories heretofore served and proposed, to be administered to the w tness L.... M...., upon the taking of his deposition in the above entitled action.

[*Date.*] Yours, etc.,

E.... F....,

Attorney for Plaintiff.

2430. Commission to take deposition (Minnesota).

[*Title.*]

[*Venue.*]

The state of Minnesota to ..... of ....., in the .... of .....

GREETING: Whereas it appears that the above entitled action is now pending in this court, and that issue was joined therein ....., 19.. [*or* that defendant is in default] and that M.... N...., of ....., in the county of ....., and state of ....., is a material witness on the part of the plaintiff in the said action, whose personal attendance cannot be procured on the trial of said action [and due notice of the said application having been given as required by law].

Now therefore, know ye, that reposing full confidence in your prudence and fidelity, you are hereby appointed sole commissioner to examine said witness, and are hereby authorized and required to cause him to come before you at such time and place as you may therefor designate and appoint and carefully to take his testimony upon all interrogatories and cross-interrogatories attached to these presents, and none others, under the oath or affirmation of said witness by you first in that behalf duly administered, and the same, when thus taken and signed and certified by you, together with this commission, and the papers hereto annexed, you will return to .... at ....., in said county of ....., with all convenient speed.

Witness, Hon. Y.... Z...., at .....

[SEAL.] aforesaid, this .... day of ....., 19..

C.... K...., Clerk.

2431. Return and certificate of commissioner upon taking deposition (Minnesota district court rule XXX).

[*The caption of the return and body of the deposition may be substantially as in Form 2414, and the certificate as follows*]:

I, O.... P...., commissioner named in the within and above written commission, do certify that the said commission was executed, and the testimony of L.... M.... was taken before me at my office, No. .... in the city of ..... state of ..... on the .... day of ..... at .... o'clock in the .... noon, and was reduced to writing by myself [*or* by deponent, *or* by N.... D...., a disinterested person, in my presence and under my direction]; that the said testimony was taken by and pursuant to the authority and requirements of the said commission, and upon the interrogatories annexed and herewith returned. The said witness, before examination, was sworn to testify to the whole truth and nothing but the truth relative to the cause specified in said commission, and the testimony of said witness was carefully read to [*or* by] said witness [by me] and then subscribed by him in my presence.

O.... P....,
Commissioner.

[*The witness must sign his name or make his mark at the end of his testimony and upon each piece of paper on which any part of his testimony is written.*]

2432. Notice of motion to suppress, and order thereon (Minnesota).

[*These may follow substantially Forms 2417 and 2418, heretofore given for use in Wisconsin.*]

2433. Notice of taking deposition (Iowa Code 1907 sec. 4687).

[*Title.*]

TAKE NOTICE that the deposition of L.... M.... of ..... county of ....., a witness on behalf of the plaintiff in the above entitled action will be taken before O.... P...., Esq., a [*give official title*], at his office in the said city of ..... on the .... day of ....., 19.., at .... o'clock A. M., to be

read as evidence on the trial of this cause and that the same will be continued from day to day until completed.

[*Date.*]

E.... F....,
Attorney for Plaintiff.

To G.... H...., Esq.,
Attorney for Defendant.

2434. Notice of issuing of commission (Iowa Code Ann. 1897 sec. 4689).

You are hereby notified that on the .... day of ....., 19.., at .... o'clock .. M. there will be issued from the office of the clerk of the district court in and for the county of ..... Iowa, a commission in the above entitled action, directed to O.... P.... [*give his official title*], of the city of ..... state of ....., directing him to take deposition of [*insert names of witnesses*] upon the several interrogatories served herewith. The same when so taken to be read upon the trial of the above entitled cause on the part of said plaintiff.

Dated at .... Iowa, this .... day of ....., 19..

E.... F....,
Plaintiff's Attorney.

To C.... D...., Defendant.
And to G.... H...., Esq., His Attorney.

2435. Interrogatories to accompany the foregoing notice (Iowa).

[*Title.*]

INTERROGATORIES to be propounded to L.... M.... in pursuance of the commission herein to be issued.

Int. 1. State your name, age, occupation and place of residence.

Int. 2. Are you acquainted with the parties to this suit, or either of them, and if so, how long have you known them or either of them?

[*Here follow with the questions necessary to bring out the facts sought for: the deposition must show affirmatively that a cause for taking the same exists, unless the fact appears elsewhere in the record. Iowa Code Ann. 1897, sec. 4709.*]

2436. Cross-interrogatories to be filed by clerk, if none be filed by adverse party (Iowa Code Ann. 1897 sec. 4692).

[*Title.*]

The defendant, not having filed any cross-interrogatories in the above entitled action, and the time for filing same having expired, I, Y.... Z...., clerk of said court, do file the following cross-interrogatories, to be propounded to the witness L.... M...., viz.:

Int. 1. Are you directly or indirectly interested in this action, and if interested, explain the interest you have?

Int. 2. Are all your statements in the foregoing answers made from your personal knowledge, and if not, do your answers show what are made from your personal knowledge, and what from information, and the source of the information? If not, show what is from information and give its source.

Int. 3. State everything you know, concerning the subject of this action favorable to either party.

Y.... Z...., Clerk, etc.

2437. Commission to take deposition (Iowa).

[*Title.*]

[*Venue.*]

To O.... P...., Esq. [*Give title.*]

You are hereby authorized and required, at such time and place as you may designate, in the county of ..... and state of ..... to cause to come before you L.... M...., of ..... in said county, for the purpose of taking his deposition upon the interrogatories and cross-interrogatories hereto annexed, which depositions are to be used in evidence on the trial of the above entitled cause now pending in the district court of ..... county, Iowa.

WITNESS [name of clerk], clerk of said district court of said county, and the seal thereof hereto affixed, at ..... this .... day of ....., 19..

C.... K....,

[SEAL.] Clerk, etc.

[The following instructions to the officer accompany each commission]:

THE OFFICER TAKING THE DEPOSITION WILL OBSERVE THE FOLLOWING FORMS AND MODE OF PROCEEDING, COMMENCING THUS:

Depositions of witnesses produced, sworn and examined at ..... in the county of ..... state of ..... before me .....in pursuance of the annexed agreement to me directed in an action now pending in the District Court of the State of Iowa, within and for ..... County, where ..... is plaintiff and ..... is defendant, on behalf of the ..... being produced, sworn or affirmed and examined on the part of the..... ..... deposes as follows: Interrogatories shall be inserted by number only, not written out, and the answer written out immediately thereunder.

Every deposition must be reduced to writing by some person who is neither of the parties, attorney of either, nor in any wise interested in the event of the suit, in the presence of the officer before whom it is taken, and signed by the witness.

If any paper or exhibit is produced and proved, or referred to by a witness, it should be described in his deposition, and marked and referred to by the deponent, in such a manner that it may be identified when the deposition is read, and all such papers and exhibits must be attached to and returned with the deposition. The officer taking the deposition will annex at the foot of the deposition of each witness the following certificate:

I, (*name of commissioner* and *style of office, if the agreement is directed to him in his official character*) within and for..... county, and state of ..... hereby certify that in pursuance of the annexed agreement to me directed, I caused to come before me at my office in (*name of place and county where the depositions are taken*) on the ..... day of ..... 1....., who was then and there by me sworn and examined, and their testimony taken and correctly and fully written down by me (*or by ..... a disinterested person, under my direction and in my presence*), and in the presence of said witnesses, and after being by me read over to the said witness, the same was subscribed and sworn to by him in my presence.

WITNESS my hand and official seal hereto affixed this ..... day of ....., 1....., at (*here state place of taking deposition*)

Then proceed with other depositions, (*if any*), in the same form annexing a like certificate to each.

When all the witnesses who appear have been sworn and examined and their depositions reduced to writing, subscribed and certified to as above, the officer will attach to the depositions all papers and exhibits proved or referred to in the examination, the agreement and notice (*herewith enclosed*) with the following certificate, endorsed thereon, or attached thereto.

State of.....}
County of.....} ss.

I, (*name of commissioner and style of office, if agreement is directed to him in his official character*), within and for ..... county, state of ....., hereby certify that in pursuance of the annexed agreement to me directed, I caused to come before me at

my office in (*name the place and county where the depositions are taken and also set forth the names of the witnesses examined*) on the..... day of ..... 1....., who were then and there by me sworn and examined, and their testimony taken and correctly and fully written down by me (*or by* ..... a disinterested person, under my direction and in my presence), and in the presence of said witnesses, and after being by me read over to the said witnesses, the same was subscribed and sworn to by them respectively in my presence, and their depositions are now herewith returned. I further certify that neither of the parties, nor the agent or attorney of either, was present during the examination of any of said witnesses (*or if they were present state the facts*).

Witness my hand and official seal hereto affixed this ..... day of ....., 1....., at (*here state place of taking depositions*).

Any exhibits offered and identified shall be referred to in the certificate, and the certificate shall show that same are a true copy thereof, is attached to and returned with the depositions. When the oath is administered to the witness by some other person, the officer's certificate shall cite such fact stating his name and official character.

When depositions are taken before an officer not having a seal, unless so done by agreement of parties, his signature and official character must be authenticated by the certificate of the Clerk of a Court of Record, or that of the officer having in charge the seal of the State, which may be in the following form:

It is HEREBY CERTIFIED, that ..... on (*here insert the date at which the Deposition was taken and certified*). ..... was, (and now is) ..... (*state the style of office*) ..... State of ..... duly commissioned, and acting as such, and that full faith and credit are due to his acts as such.

IN TESTIMONY WHEREOF, I, A. B. (*here state the style of office*), have hereunto subscribed my name, and affixed the seal of said Court, at my office, this ..... day of ....., 1..... .....

The officer taking the depositions is required to enclose in a strong envelope, securely sealed, the Deposition, Papers and Exhibits, Agreement, Notice and Certificate and direct the same to the Clerk of the..... ..... Court of Iowa, in and for ..... county, noting on some convenient part of the envelope the style of the cause.

..... vs. ..... } Depositions on part of.....

Forward by mail or express unless the parties have agreed on some other mode of transmission.

The depositions must be begun on the day mentioned in the notice. If they cannot be completed on that day, the taking of them may be adjourned to the succeeding day, at the same place, and between the same hours. The person taking them should in such case, make the following entry closing the business for the day, viz.:

Not being able to complete the taking of said deposition, by reason that (*here insert the reason*). I adjourn the further taking of the same until tomorrow, then to be continued at the same place, and between the same hours mentioned in the annexed notice.

On the succeeding day let the person taking the deposition commence as follows:

Purusant to the adjournment as above, on the..... day of ....., in the year ....., and between the hours of ..... in the forenoon, and ..... in the afternoon, at the ....., I continued the taking of said depositions as follows:

....., in continuance of his deposition commenced yesterday, on his oath further says, etc.

The deposition may be taken in shorthand, in which case the certificate of the person taking it, on notice or agreement, must show that the testimony of the witness was correctly taken down in shorthand, and was correctly extended, and that the notes of his testimony or such extension thereof, was read over to the witness, and signed by him, and sworn to, if within the state, before a person authorized to administer oath, and if without the state, before one of the officers authorized to take depositions outside the state, and such extension, together with the shorthand notes, if signed and sworn to, must be returned on the deposition. Any one taking depositions in shorthand shall first take and subscribe an oath to take down and transcribe correctly such testimony, and shall certify that his translation thereof is full, true and complete.

Tax proper fees at end of deposition as follows: Commissioner's fees $..... ..... Witness ..... Days ..... Miles $.....

Above fees paid by .....

.....

(*Signature of Commissioner.*)

The foregoing directions must be strictly observed, or the deposition will be unavailing.

If the officer taking the deposition has a seal of office, it must be affixed to every certificate.

2438. Agreement to take deposition (Iowa Code Ann. 1897, sec. 4686).

[*Title.*]

It is stipulated and agreed that the deposition of L.... M...., a witness in the above entitled action on the part of the plaintiff, may be taken upon the interrogatories and cross-interrogatories annexed hereto [*or* upon oral interrogatories] before O.... P...., Esq., as commissioner [*give official title*] of ..... county of ..... state of ..... at his office in said city of ..... on the .... day of ....., 19.., said deposition to be used upon the trial of the above entitled action by the said plaintiff.

Notice and copy of the interrogatories and the suing out of a commission are hereby waived, but said deposition to be subject to all just exceptions not herein waived.

Dated ....., 19..

E.... F...., Plaintiff's Attorney.

G.... H...., Defendant's Attorney.

2439. Caption for depositions, general form (Iowa).

DEPOSITIONS OF WITNESSES produced, sworn, and examined at the city of ..... county of ..... and state of ..... before me, O.... P.... [*give official title*], in pursuance of the annexed notice [*or, if taken upon commission,* a commissioner duly appointed for that purpose by the terms of the annexed commission, *or* agreement] in a certain action now pending in the ..... court of the state of Iowa for ..... county, wherein A.... B.... is plaintiff and C..... D.... is defendant, on behalf of the plaintiff.

L.... M.... being duly sworn [*or* affirmed], and examined on the part of the plaintiff, testified as follows:

[*Insert interrogatories and answers.*]

Upon cross-examination he testified as follows:

[*Insert cross-interrogatories, etc.*]

[*The witness should sign at the end of his testimony and a jurat should be added, signed by the officer.*]

2440. Certificate to depositions.

[*Venue.*]

I, O.... P.... [*give official title*] [*if taken on commission or agreement, add:* a commissioner duly appointed in and by the annexed commission, *or* agreement], do hereby certify that in pursuance of the annexed notice [*or* commission, *or agreement, as the fact may be*], I caused to come before me at ..... on the .... day of ....., 19.., between the hours of .... o'clock in the forenoon and .... o'clock in the afternoon [*names of witnesses*], who were then and there by me duly sworn [*or* affirmed] and examined, and their testimony was correctly and fully written down by me [*or*, by Q.... R.... a disinterested person, under my direction and in my presence] and after being by me read over to said witnesses, the same was subscribed and sworn to by them respectively in my presence, and their said depositions are now herewith returned. I further certify that E.... F.... was present and conducted the examination on behalf of the plaintiff, and G.... H.... was present and cross-examined said witnesses for the defendant. [*Or if taken on commission and on interrogatories:* and I further certify that neither of the

parties, nor the agent or attorney of either of said parties was present during the taking of said depositions.]

WITNESS my hand and official seal,

[SEAL.] this .... day of ....., 19.., at ....

O.... P....,

[*Official title.*]

2441. The same, by stenographer.

[*Venue.*]

I, O.... P.... [*give official title*], a stenographer, hereby certify that in pursuance of the annexed notice [*or* commission] caused to come before me at ..... on the .... day of ....., 19.., between the hours of .... o'clock in the forenoon and .... o'clock in the afternoon [*names of witnesses*] who were then and there by me duly sworn [or affirmed] and examined, and their examination was by me correctly taken down in shorthand, and was by me correctly extended into long hand, and when so extended was read to said witnesses respectively in my presence, and the same was then subscribed and sworn to by said witnesses respectively in my presence, and such extension and said shorthand notes are now herewith returned as the depositions of the said witnesses. I further certify that before beginning the taking of said depositions in shorthand I took and subscribed an oath to take down and transcribe correctly such testimony, and said oath is hereto attached. I further certify that the translation of my said shorthand notes so taken is a full, true and complete translation thereof.

I further certify that E.... F.... was present and conducted the examination on behalf of the plaintiff, and G.... H.... was present and cross-examined said witnesses for the defendant [*as the case may be*].

WITNESS my hand and official seal hereto annexed at ..... in the county

[SEAL.] of ..... state of ..... this .... day of ....., 19..

[*Signature of officer.*]

2442. Authentication of official character, if taken before officer having no seal (Iowa Code Ann. 1897 sec. 4703).

[*Venue.*]

I, C.... K...., clerk of the ..... court in and for said county, hereby certify that O.... P...., before whom the foregoing depositions were taken, was at the time of taking the same [*give official title*], and duly qualified as such and authorized to take such depositions, and that his signature to the above certificate is genuine.

GIVEN under my hand and the seal of said court, this .... day of ....., 19..

[SEAL.]

C.... K...., Clerk, etc.

2443. Notice by clerk of filing of deposition (Iowa Code Ann. 1897 sec. 4711).

[*Title.*]

[*Venue.*]

To E.... F...., Esq., Plaintiff's Attorney, and G.... H...., Esq., Defendant's Attorney.

TAKE NOTICE that the depositions of [*here insert names of witnesses*], who have been examined as witnesses on behalf of plaintiff in the above entitled cause now pending in said court, were received by me and filed in my office at ..... in ..... county, Iowa, on the .... day of ....., 19..

WITNESS my hand and seal of said court, the day and date above written.

[SEAL.]

C.... K...., Clerk, etc.

2444. Notice to take deposition (Nebraska).

.... Judicial District of Nebraska
District Court, ... County.

A.... B...., Plaintiff,
vs.
C.... D...., Defendant.

[*Venue.*]

To C.... D...., the above named defendant, and G.... H...., his attorney.

TAKE NOTICE that on the .... day of ....., 19.., the plaintiff will take the depositions of [*name witnesses*] to be used as evidence on the trial of the above entitled cause, before O.... P...., Esq., [*give official title*] at ..... county of ..... and state of ....., at .... o'clock .. M. of that day, with authority to adjourn from day to day until such depositions shall all have been taken.

[*Date.*]

E.... F....,
Plaintiff's Attorney.

[*The following instructions to the officer accompany the notice*]:

BEGIN WITH THE FOLLOWING CAPTION:

Depositions of sundry witnesses taken before me (*here insert the name of the Magistrate and his official character as a Justice of the Peace or Notary Public, etc.*), within and for the County of ....., in the State of ....., on the ..... day of ....., in the year ....., between the hours of .....A. M. and ..... P. M. at ....., in said county, pursuant to the annexed notice (*or agreement as the case may be*) to be read in evidence in behalf of the (plaintiff or defendant as the case may be) in an action pending in ..... (*naming the court*) in which ..... plaintiff and ..... defendant.

"A. B., of lawful age, being by me first duly examined, cautioned, and solemnly sworn (*or affirmed*), as hereinafter certified, deposeth and sayeth as follows, viz." (*here write the deposition*) and so on with all the witnesses.

The deposition may be taken by stating the facts in reply to questions first written down, or in a narrative form.

In Nebraska they may be taken before a Judge or Clerk of the Supreme or District Court, Probate Judge, or before a Justice of the Peace, Notary Public, Mayor, or Chief Magistrate of any City or Town corporate, Master Commissioner, or person empowered by special commission; *out of Nebraska*, by a Judge, Justice, or Chancellor of any Court of Record, a Justice of the Peace, Notary Public, Mayor, or Chief Magistrate of any City or Town corporate, Commissioner appointed by the Governor of Nebraska to take depositions, or any person authorized by special commission.

If there are adjournments they should be noted by the Magistrate or other officer taking the depositions, from day to day, at the close of the day with the reasons therefor.

Objections should be entered to questions supposed to be illegal. This entry is made on behalf of the party raising the objections, simply by a short note made by the Magistrate or officer taking the depositions.

Each witness must sign his own deposition.

The notice must be attached to the depositions and enclosed with them.

The depositions must be commenced on the day named, and some portion of a deposition taken on each successive day, Sundays excepted, adjournments being from Saturday to Monday, Sundays and national holidays not being regarded.

When depositions are taken under an agreement, the above instructions will be followed except where they are modified by the agreement. In such case the agreement will be followed. It should be attached to deposition, if sent, and referred to in the caption, as the notice is when taken under notice.

If taken by interrogatories and cross-interrogatories, under agreement or otherwise, every interrogatory and cross-interrogatory must be put to each witness and answered as far as he can answer it, and the answer be written down. The deposition must show that each interrogatory was thus put and answered.

The fees for taking the depositions should be taxed, and a memorandum made by whom they were paid. Close the depositions with a certificate in the form following, viz.:

"STATE OF.....}
COUNTY OF.....} ss.

I, A. B. (naming the official character of the magistrate according to the fact), do hereby certify that (naming all the witnesses who have testified) were by me first severally duly sworn (*or affirmed*) to testify the truth, the whole truth and nothing but the truth, and that the depositions by them respectively subscribed as above set forth, were reduced to writing by myself (*or if by any other person name him and say* by....., who is not interested in the suit, in my presence and) in the presence of the witnesses respectively, and were respectively subscribed by the said witnesses in my presence and were taken at the time and place in the annexed notice (or agreement) specified; that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit; (*if there be adjournments, add*) and said depositions were commenced at the time in said notice specified, and continued by adjournment from day to day, as above stated.

(Signed.) In testimony whereof, etc., A..... B....."

Depositions taken before any authorized officer having an official seal must be certified by him under such seal and his official signature. If the officer have no official seal, the deposition (*if not taken in this state*) must be certified and signed by such officer, and further authenticated by parol proof adduced in court, or by the official certificate and seal of any Secretary or other officer of State keeping the great seal thereof, or of the clerk or prothonotary of any court having a seal, attesting that such judicial or other officer was, at the time of taking the same, authorized to do so (*as being one of the officers above mentioned*). This certificate should be attached to the certificate of the officer taking the deposition.

This proof of official character is omitted when waived by agreement of parties by endorsement on notice; but this agreement does not waive the taking at the special time and place.

The whole should be sealed up by the officer taking the same, and the envelope addressed to the Clerk of the Court in which the action is pending, and endorsed as follows:

"A..... B..... against C..... D..... (*giving the title of the cause*). Depositions in said action on behalf of the ..... (plaintiff or defendant as the case may be). These depositions taken, sealed up, endorsed, addressed, and transmitted by me.

L..... M.,..... Notary Public."

2445. Commission and return (Nebraska).

THE STATE OF NEBRASKA,
.....County. } ss.

To L.... M....

KNOW YOU, That you have been appointed by the .... court of ..... county, Nebraska, and are hereby vested with full power and authority to examine, under oath, on the interrogatories hereto attached, E.... F...., and G....-H...., and that, having reduced such examination to writing, and caused the same to be subscribed by the witnesses you do return the same, closed up, together with this writ, to this court, with all possible dispatch, to be used on the trial of a cause now pending in said court, wherein A.... B.... is plaintiff, and C.... D.... is defendant.

WITNESS my hand and the seal of said Court, this ..... day of .....

[SEAL.] A. D. 19..

L.... M....,
Clerk.

Return of commission.

According to the command of the within writ I caused the said E.... F.... and G.... H.... to come before me on the .... day of ....., 19.., at ..... in the county of ..... and state of ..... and having first duly sworn the said E.... F.... and G.... H.... to testify the truth, the whole truth, and nothing but the truth, proceeded to examine them on the interrogatories attached to said writ, and reduced their answers thereto to writing, and caused the said witnesses to subscribe the same in my presence; which examinations, so taken, reduced to writing, and subscribed are herewith returned.

L.... M....,
[*Official Title.*]

2446. Caption and certificate to depositions taken on notice or agreement (Nebraska).

DEPOSITIONS of sundry witnesses taken before me [*give name and official title*] within and for the county of ..... in the state of ..... on the .... day of ..... in the year 19.. between the hours of .... A. M. and .... P. M., at ..... in said county, pursuant to the annexed notice [*or agreement, as the case may be*] to be read in evidence in behalf of the plaintiff, in an action pending

in the ..... court, in which A.... B.... is plaintiff and C.... D.... is defendant.

L.... M...., of lawful age, being by me first duly examined, cautioned and solemnly sworn [*or* affirmed], testifies as follows:

[*Here follow questions and answers.*]

[*Adjournment should be noted, with reasons, and each witness must sign his own deposition.*]

[*Venue.*]

I, O.... P.... [*here official title*] hereby certify that [*name witnesses*] were by me first severally duly sworn [*or* affirmed] to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them respectively subscribed as above set forth, were reduced to writing by myself [*or if by any other person name him, and say:* by J.... R...., who is not interested in the suit, in my presence, and] in the presence of the witnesses respectively, and were respectively subscribed by the said witnesses in my presence, and were taken at the time and place in the annexed notice [*or agreement*] specified; that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit [*if there be adjournments add*], and said depositions were commenced at the time in said notice specified, and continued by adjournments from day to day, as above stated.

WITNESS my hand and official
[SEAL.] seal, this .... day of ....., 19..

[*Signature.*]

Endorsement on envelope.

[*Title of case.*]

DEPOSITIONS in said action on behalf of the plaintiff.

These depositions taken, sealed up, indorsed, addressed, and transmitted by me.

[*Official signature.*]

2447. Depositions (North Dakota and South Dakota).

With some slight changes, the forms given for use in Wisconsin and Minnesota may be used in North and South Dakota.]

2448. Certificate of officer (South Dakota).

STATE OF SOUTH DAKOTA, }
County of..... } ss.

BE IT KNOWN, That I took the annexed deposition of E.... F.... and G.... H.... pursuant to the annexed stipulation [commission or notice]; that I was then and there a [*name office*] in and for said county and state; that I exercised the power of that office in taking such deposition; that by virtue thereof I was then and there authorized to administer an oath; that I am not an attorney or relative of either party or otherwise interested in the event of the within action; that each witness, before testifying, was duly sworn to testify the truth, the whole truth, and nothing but the truth relative to the cause specified in the annexed stipulation [commission *or* notice]; that the deposition of each witness was reduced to writing by me [*or* by J.... K...., a disinterested and proper person]; that the deposition of each witness was written and subscribed in my presence and in the presence of the witness; that said deposition was taken at .... on the .... day of ....., 19.., at .... o'clock .. M.; that the examination was conducted on behalf of the plaintiff by ..... R.... S....; that the examination was conducted on behalf of the defendant by N.... O....

WITNESS my hand and seal this .... day of ....., 19..

[SEAL.] L.... M....,
[*Official Title.*]

[*The following instructions are sent to the officer taking a deposition to be used in South Dadota.*]

INSTRUCTIONS FOR TAKING DEPOSITION.

These instructions should be carefully read and strictly followed, or the deposition may prove entirely worthless.

Begin with the following caption:

"Deposition of sundry witnesses [*or* if but one witness, say deposition of ..... naming him] taken before me [*here insert the name of the officer and his official character as Justice of Peace or Notary Public, etc.*] within and for the county of ..... in the State [or Territory as the case may be] pursuant to the annexed notice and at the time and place mentioned therein, [or agreement as the case may be] to be read in evidence in behalf of the [plaintiff or defendant as the case may be] in an action pending in ..... [*naming the court*] in which ..... plaintiff and defendant."

If the parties or either of them appear, an entry thereof should be here inserted according to the fact:

The plaintiff ..... apearing [in person or by ..... his or their attorney or attorneys.] The defendant ..... appearing [in person or by ..... his or their attorney or attorneys.]

If there is no appearance either in person or by attorney omit any entry in regard to it.

A..... B....., of lawful age, being by me first duly and solemnly sworn, as hereinafter certified [or affirmed] deposeth and sayeth as follows, viz.: [*here write the deposition*] and so on with all the witnesses.

The deposition may be taken by stating the facts in reply to questions first written down or in a narrative form.

In South Dakota they may be taken before a Judge or Clerk of the Supreme or Circuit Court or before a Justice of the Peace, Notary Public, or any person empowered by special commission; out of this State by a Judge, Justice, Chancellor or Clerk of any Court of Record, a Justice of the Peace, Notary Public, Mayor or Chief Magistrate of any City, or town corporate, Commissioner appointed by the Governor of South Dakota to take depositions, or any person authorized by special commission.

The officer before whom depositions are taken, must not be a relative or attorney of either party or otherwise interested in the event of the action or proceeding.

If there are adjournments they should be from day to day, and noted by the Magistrate or other officer taking the depositions, at the close of the day, with the reasons therefor.

OBJECTIONS—If the party against whom the depositions to be read appears, he may make objections to questions supposed to be illegal. This entry is made on behalf of the party raising the objection by the Magistrate or officer taking the deposition.

Each witness must sign his own deposition.

The notice must be attached to the depositions and enclosed with them.

The depositions must be commenced on the day named, and if not completed adjournments may be taken from day to day, Sundays excepted, adjournments being from Saturday to Monday, Sundays and National holidays not being regarded.

The deposition must be written by the officer, or in his presence by the witness or some disinterested person.

When depositions are taken under an agreement, the above instructions will be followed, except where they are made by the agreement. In such case the agreement will be followed. It should be attached to the deposition, if sent, and referred to in the caption, as the notice is when taken under a notice.

If taken by interrogatories and cross-interrogatories under agreement or otherwise, every interrogatory or cross-interrogatory must be put to each witness, and answered as far as he can answer it and the answer be written down. The deposition must show that each interrogatory and cross-interrogatory was thus put and answered.

The fees for taking the deposition should be taxed, and a memorandum made by whom they were paid. Close the deposition with a certificate in the form following, viz.:

"I, A..... B....., [*naming the official character of the officer according to the fact*] do hereby certify that I am not an attorney or relative of either party or otherwise interested in the event of the within action, that [naming all the witnesses who have testified] were by me first [severally] duly

sworn [*or* affirmed] to testify the truth, the whole truth and nothing but the truth, and that the deposition, [by them respectively, or him as the case may be] subscribed as above set forth, were reduced to writing by myself, [*or* if by any other person, name him and say by .....] who is not interested in the suit, in my presence, [and in the presence of the witness or] witnesses respectively, [as the case may be] and were [respectively] subscribed by the said witness—in my presence, and were taken at the time and place in the annexed notice [or agreement] specified; if there be adjournments, add, [and said depositions were commenced at the time in said notice specified, and continued by adjournment from day to day as above stated.]

[*Signed*] A..... B..... [*with name of office.*]"

Depositions taken by any judicial or other officer herein authorized to take depositions, having a seal of office, whether resident of this ..... or elsewhere, shall be admitted in evidence upon the certificate and signature of such officer, under the seal of the Court of which he is an officer, or his official seal, and no further act or authentication shall be required. If the officer taking the same have no official seal, the deposition if not taken in this state, shall be certified and signed by such officer, and shall be further authenticated by the official certificate and seal of any Secretary or other officer of State keeping the great seal thereof; or of the clerk or prothonotary of any court having a seal, attesting that such judicial or other officer was at the time of taking the same, authorized to take the same.

This certificate should be attached to the certificate of the officer taking the deposition.

The deposition so taken shall be sealed up and endorsed with the title of the cause [the same time is given in the notice to take the depositions] and the name of the officer taking the same, and by him addressed and transmitted to the Clerk of the Circuit where the action of proceeding is pending.

2449. Affidavit for examination of witness (Cal. C. C. P. 1906 secs. 2024–2031).

[*Title.*]

[*Venue.*]

A.... B...., being first duly sworn says that he is the plaintiff in the above entitled action in which a summons has been served. That one E.... F.... is a necessary and material witness for affiant on the trial of this action without whose testimony affiant cannot safely proceed to trial thereof, and that said E.... F.... is about to leave said county of ..... where said action is pending and will be tried to be absent for a year [*or otherwise state the time*] and long past the time when said action will be tried [*or otherwise state the facts showing that the case is within Cal. C. C. P. 1906, sec. 202*].

Affiant further states that he is informed and believes that said E.... F.... intends to leave said county on ....., 19.., and that affiant was not aware of his intended depar-

ture in time to give five days' notice of the time and place of taking his deposition. That the defendant's attorneys are Messrs. ...., who reside at .....
[*Jurat.*]

A.... B....

2450. Notice of taking deposition (California).

[*Title.*]
To C.... D...., defendant and to his attorneys.

TAKE NOTICE, That the deposition of E.... F.... to be used in the trial of this action on behalf of the plaintiff will be taken before L.... M...., Esq., a [*official title*] at his office in the city of .... county of ..... at the hour of .... o'clock ....., 19.., and if not completed on that day the taking will be continued from day to day thereafter until completed.

You will further take notice that the annexed is a copy of an affidavit made by the plaintiff above named upon which the order at the foot hereof is based.

[*Dated.*]

L.... M....,
Attorney for Plaintiff.

2451. Order shortening time of notice.

[*Title.*]

It appearing to me that good cause exists therefor, it is hereby ordered that the time of giving the foregoing notice be and is hereby shortened to one day.

[*Dated.*] J.... K....,
Judge.

2452. Affidavit for issuance of commission for witness in another state (California).

[*Title.*]
[*Venue.*]

A.... B.... being duly sworn says that he is the plaintiff in this action and that E.... F.... of ..... is a necessary and material witness for the plaintiff in this action without whose testimony he cannot safely proceed to trial, that

said witness resides in ..... and is now outside of this state and will continue absent from the state when his testimony is required in this action.

A.... B....,

[*Jurat.*]

2453. Notice of motion for commission (California).

[*Title.*]

To C.... D.... defendant and to ..... defendant's attorneys.

TAKE NOTICE, That upon the annexed affidavit and upon the pleadings in this action served and filed the undersigned will move the above named court at ..... on ....., 19.., at the opening of court on that day or as soon thereafter as counsel can be heard, that a commission issue out of and under the seal of this court to take the testimony of E.... F.... a witness residing out of this state at .....; said commission to be directed to some proper person residing at the city of ..... in the state of ..... to be appointed by the judge of this court.

[*Dated.*]

L.... M....,
Plaintiff's Attorney.

2454. Notice of taking deposition of resident witness (Colorado).

[*Title.*]

To the above named C.... D.... defendant and to G.... H...., his attorney.

TAKE NOTICE, That the deposition of E.... F...., will be taken before N.... O...., a [*name office*], at his office at ..... on the .... day of ....., 19.., commencing at the hour of .... o'clock in the .... noon of said day, to be read in evidence on the trial of the above entitled cause, on the part of the plaintiff at which time and place of examination above mentioned for the taking of such deposition you can appear, and cross-examine the said witness.

Dated this .... day of ....., 19..

L.... M....,
Attorney for Plaintiff.

2455. Affidavit accompanying above notice.

[*Title.*]
[*Venue.*]

A.... B.... being first duly sworn, makes oath and says that he is the plaintiff in the above entitled action, that E.... F...., who is a material witness for the plaintiff in this action is about to leave the county when this action is to be tried and will probably be absent when his testimony is required. That affiant desires the deposition of said witness to be read in evidence on the trial of said cause.

A.... B....

[*Jurat.*]

2456. Notice and interrogatories for issuance of commission for nonresident witness (Colorado).

[*Title.*]

TAKE NOTICE, That on the .... day of ....., 19.., the plaintiff above named will sue out from the clerk's office of the said court a commission, to take the deposition of E.... F...., a witness residing in the ..... of ..... in the county of ....., in the state of ..... to be read in evidence on the part of the plaintiff upon the trial of the above entitled action. The said commission to be directed to O.... P...., Esq., of the ..... The interrogatories to be propounded to the said E.... F.... on behalf of the plaintiff are hereunto subjoined and you can file cross interrogatories and join in such commission, if you see fit.

[*Date.*]

L.... M....,
Attorney for Plaintiff.

[*Title.*]

INTERROGATORIES to be propounded to E.... F...., a witness to be produced, sworn and examined on this behalf on the part of the plaintiff above named by virtue of the commission or dedimus potestatem to be issued herein:

Int. 1. What is your name, age, occupation and place of residence?

Int. 2. Do you know the parties, plaintiff and defendant in this cause, or either of them? If yea, how long have you know them, and each of them, respectively?

Int. 3. [*Insert third question and so continue*].
[*Repeat the introductory paragraph for each witness.*]

2457. Commission to take testimony upon interrogatories (Colorado).

[*Venue.*]

THE PEOPLE of the State of Colorado to [*name commission*].

WHEREAS it appears that E.... F.... of ..... is a material witness in an action pending in our ..... court for the county of ..... wherein A.... B.... is plaintiff and C.... D.... is defendant, and that said E.... F.... resides at ....., without the state of Colorado, and that his personal attendance can not be had at the trial of this cause; now,

KNOW YE, That we, having full faith and confidence in your prudence and fidelity, have appointed you commissioner to examine the said witness, and we do authorize and empower you, at a time and place to be fixed by you, diligently to examine the said witness on the interrogatories and cross-interrogatories attached hereto, on his corporal oath first taken before you, and cause the said examination of such witness to be reduced to writing and signed by said witness and by yourself, and then return the same, annexed to said commission, unto our said court with all convenient speed.

WITNESS the Hon. J.... K.... Judge of the .... court aforesaid and the seal of said court this ..... day of ....., 19..

[SEAL.]

R.... S....,
Clerk.

Instructions sent with the foregoing commission.

CAPTION OF THE DEPOSITION.

"The deposition of ..... of the County of ..... and State (or Territory) of ..... a witness of lawful age, produced, sworn and examined, upon his corporal oath, on the ..... day of ..... in the year of our Lord, one thousand nine hundred and ..... at the office (or house) of ..... in the town (or city) of ..... in the County of ..... and State (or Territory) aforesaid, by me ..... a Commissioner (or by "us," if more than one Commissioner, inserting all the names of the Commissioners), duly appointed by a Dedimus Potestatum or Commission, issued out

of the Clerk's Office of the ..... Court of ..... County, in the State of Colorado, bearing Teste in the name of ..... Esq., Clerk of the said ..... Court, with the seal of the said Court affixed thereto, and to me (or "us," if more than one) directed as such Commissioner (or "Commissioners") for the examination of the said ..... a witness in a certain suit and matter in controversy now pending and undetermined in the said ..... Court, wherein ..... is plaintiff, and ..... is defendant, in behalf of the said ..... as well upon the cross interrogatories of the ..... as on the interrogatories of the ..... which were attached to or inclosed with the said Commission, and upon none others. The said ..... being first duly sworn by me (or "by ..... one of said Commissioners," if more than one) as a witness in the said cause, previous to the commencement of his examination, to testify the truth, the whole truth, and nothing but the truth, in relation to the matters in controversy between the said plaintiff and defendant, testified and deposed as follows:

"Interrogatory First." (*Here insert first interrogatory.*)

"Answer to first interrogatory." (*Here insert the answer*), and so on successively in the order in which the interrogatories may be propounded and answered. Then follow "cross interrogatories and answers thereto, by the witness, on the part of the defendant" (or plaintiff, as the case may be). (*Here again write down the interrogatories and answers successively in the order aforesaid.*)

After the deposition is taken, the interrogatories and answers should be read over to the witness, and if he assents to the truth of the answers as written down, the witness will then sign his name at the bottom of the deposition, and swear to the truth of it before the Commissioner (or one of the Commissioners, if more than one). This oath is in addition to the preliminary oath which is administered previous to the commencement of his examination.

The Commissioner should then certify as to the time, place, and manner of taking the deposition, as follows:

I, ... of the County of ..... and State (or Territory) of ..... a Commissioner duly appointed to take the deposition of the said ..... a witness whose name is subscribed to the foregoing deposition, do hereby certify that previous to the commencement of the examination of the said ..... as a witness in the said suit between the said ..... plaintiff, and the said ..... defendant, he was duly sworn by me (or "..... one of said Commissioners," if more than one), to testify the truth, the whole truth and nothing but the truth in relation to the matters in controversy between the said ..... plaintiff, and the said ..... defendant; that the said deposition was taken in my office (or "at the house of .....") in the city (or town) of ..... in the County of ..... and State (or Territory) of ..... on the ..... day of..... A. D., 19.....; and that after said deposition was taken by me (or "us") as aforesaid, the interrogatories and answers thereto, as written down, were read over to the said witness; and that thereupon the same was signed and sworn to by the said deponent ..... before me (or "us"), the oath being administered by ..... one of said Commissioners (where there is more than one such Commissioner), at the place and on the day and year last aforesaid.

(Signed) ..... Commissioner.

(The foregoing certificate of Commissioner should be at the foot or bottom of the deposition, immediately following the signature of the witness.)

The Commissioner should then fold up the deposition as thus taken and certified, together with the commission and interrogatories, and all exhibits (if any) produced on the examination, properly marked or lettered, as "Exhibit A" "Exhibit B," etc., and enclose the whole in a suitable wrapper or envelope, then seal up the same securely with three seals, writing his name transversely across the middle seal; or, if two Commissioners, they will each write their names, one on each of the outside seals; or, if three Commissioners, then each one will write his name across one of the seals in the manner aforesaid. The Commissioner (or Commissioners) will also endorse the names of the parties to the suit, transversely across one end of the package thus sealed up, according to the proper title of the suit, and direct the same to the proper address of the Clerk, who may issue the Commission, and transmit the same by mail to the proper Post office. Neither of the parties to the suit, or their attorneys or agents, or any person at all interested in the event of the suit, are permitted by law to dictate, write or draw up any part of the deposition required to be taken as aforesaid.

N. B.—It is important to the validity of the deposition, that these requirements and instruction should be strictly attended to.

P. S.—One caption will answer for the deposition of several witnesses, where they are all taken at the same time and place, to be read as evidence in the same suit, by so modifying the form here given, as to be applicable to the number of witnesses examined—as, for instance, at the commencement say:

"The depositions of A. B., C. D., and E. F., of the County of ..... and State of ..... witnesses of lawful age, produced, sworn and examined on their respective corporal oaths," etc., and then in the latter part of the caption say: "The said A. B., C. D., and E. F., being first duly sworn by me as witnesses in said case," etc. Then, at the commencement of each deposition, say: "Interrogatories propounded to the said A. B., a witness produced and sworn as aforesaid, on the part of the said ..... and his answers thereto, as follows:"

"Interrogatory First." (*Here insert the interrogatory.*)

"Answer to first interrogatory." (*Here insert answer.*)

And so on successively with all the interrogatories to be propounded to that witness. Then insert the cross interrogatories as before directed. The deposition should then be read over to the witness, and signed and sworn to by him before the next witness is examined. Then proceed with the second and third witnesses in like manner, to the end.

One certificate as to the time, place and manner of taking such depositions, and that each one was signed and sworn to by such witnesses respectively, will be sufficient, provided due care be taken to insert the names of ALL the witnesses, and the certificate in other respects be in conformity with the form given in the first instance.

Great care should always be taken to attach such deposition firmly together, by means of tape or ribbon, and using wax, wafers, or eyelets, when necessary.

2458. Notice of taking of depositions (Missouri).

[*Title.*]

To the Above Named Defendant.

You are hereby notified that depositions of witnesses, to be read in evidence in the above entitled cause, on the part

of the plaintiff will be taken at ..... in the county of ..... and state of ..... on the ..... day of ....., 19.., between the hours of eight o'clock in the forenoon and six o'clock in the afternoon of that day; and that the taking of said depositions, if not completed on that day, will be continued from day to day, at the same place and between the same hours, until completed.

L.... M....,
Attorney for Plaintiff.

Service of the above notice is hereby acknowledged, and issue of dedimus, and all exceptions as to time, waived.

Dated ....., 19..

R.... S....,
Defendant's Attorney.

2459. Notice to take depositions (Oklahoma).

[*Title.*]

To C.... D.... defendant and to G.... H.... his attorney of record.

TAKE NOTICE, That on the .... day of ....., 19.., the plaintiff above named will take the depositions of E.... F.... and N.... O.... to be used as evidence on the trial of the above entitled action at ..... beginning at the hour of .... o'clock A. M. of said day, and that the taking of the same will be adjourned and continued from day to day at the same place until they are completed.

[*Dated.*]

L.... M....,
Plaintiff's Attorney.

Instructions accompanying the above notice.

INSTRUCTIONS.

To be Strictly Followed.

349—1. Depositions may be taken out of this State by a Judge, Justice or Chancellor of any Court of Record, a Justice of the Peace, Notary Public, Mayor or Chief Magistrate of any city or town corporate, a Commissioner appointed by the Governor of this State to take depositions or any person authorized by special commission from this State.

350—2. The officer taking depositions must not be a relative or attorney of either party, or otherwise interested in the event of the suit.

354—3. The deposition shall be written in the presence of the officer

taking the same, either by the officer, the witness, or some disinterested person and subscribed by the witness.

355—4. The depositions so taken shall be sealed up and endorsed with the title of the cause and the name of the officer taking the same, and by him addressed and transmitted to the Clerk of the Court where the action of proceeding is pending.

358—5. If the officer taking the same has no official seal, the deposition if not taken in this State, shall be certified and signed by such officer, and shall be further authenticated by the official seal and certificate of the Secretary or other officer of the State keeping the great seal thereof, or of the Clerk or other notary or any clerk having a seal, attesting that such judicial or other officer was, at the time of taking the same, duly qualified and acting as such officer.

359—6. The officer taking the depositions shall annex thereto a certificate showing the following facts: That the witness was first duly sworn to testify to the truth, the whole truth and nothing but the truth; that the deposition was reduced to writing by some proper person, naming him; that the deposition was written and subscribed in the presence of the officer certifying thereto; that the deposition was taken at the time and place signified in the notice.

FORMS.

1. HEADING TO DEPOSITIONS.

"Depositions of witnesses taken to be used in an action pending in the —— Court within and for the County of ——, in the State of Oklahoma, wherein —— —— plaintiff, and —— —— defendant, in pursuance of the notice hereto attached and at the time and place therein stated. The said —— —— plaintiff appeared in —— own behalf [or by —— attorney] and the said —— —— defendant, in —— own behalf [or by —— attorney] [or if the adverse party does not appear nothing need be said as to his appearance.] And thereupon the —— produced the following witnesses in order, to-wit: —— of lawful age, being first duly sworn deposeth and saith ——. Also —— who, being first duly sworn, deposeth and saith," etc.

Where the witness is examined by questions the form will be as above, adding after "saith," "in reply to the interrogatories propounded to-wit," etc.

2. CERTIFICATE ATTACHED TO DEPOSITION.

I, —— —— (Justice of the Peace or Judge, Notary, etc.) within and for the County of —— in the State of Oklahoma, do hereby certify that the above named ——, the witnesses whose names are severally subscribed to the foregoing depositions, were by me first duly sworn (or affirmed), to testify to the truth, the whole truth and nothing but the truth, in the case aforesaid, and that the depositions by them respectively subscribed were reduced to writing by —— —— and subscribed by the respective witnesses in my presence, and the same were taken on the —— day of —— A. D. 19——, between the hours of 8 o'clock a. m. and 6 o'clock p. m. of said day and at the office of —— in the Town of —— in the County of —— and —— of —— as specified in the notice thereto attached, and that I am not attorney for either of said parties or otherwise interested in the event of said action.

N. B.—If the officer has no official seal, his official character must be certified as directed in section 3.

3. ENDORSEMENT ON ENVELOPE.

—— —— Pl'ff
vs. } ss.
—— —— Df't

To the Clerk of the —— Court of —— County, State of Oklahoma —— at—— State of Oklahoma. Depositions taken by me.

[Signed] —— ——
[Title of Officer] ——

4. AFFIDAVIT OF SERVICE.

STATE OF OKLAHOMA, }
—— County. } ss.

—— —— being duly sworn, states that he made service of the within notice on —— —— by delivering to —— —— his attorney of record, a duplicate thereof at —— State of Oklahoma, on —— A. D. 19—

Subscribed in my presence and sworn to before me this —— —— day of —— —— A. D. 19—

—— ——

CHAPTER CXXXIV.

PERPETUATION OF TESTIMONY.

2460. Application for perpetuation of testimony of witness within the state. (Wisconsin and Minnesota).
2461. Notice thereon. (Wisconsin and Minnesota).
2462. Certificate to same. (Wisconsin and Minnesota).
2463. Application for commission to perpetuate the testimony of witnesses outside of the state. (Wisconsin and Minnesota).
2464. Order thereon. (Wisconsin and Minnesota).
2465. Commission, return, and certificate, in proceedings for the perpetuation of testimony. (Wisconsin and Minnesota).
2466. Application to take deposition for the perpetuation of testimony against all persons. (Wisconsin).
2467. Commission thereon. (Wisconsin).
2468. Notice of perpetuation of testimony, as against all persons, to be given by commissioner. (Wisconsin).
2469. Return and certificate in proceedings to perpetuate testimony against all persons. (Wisconsin).
2470. Petition for perpetuation of testimony. (Iowa, South Dakota and Nebraska).
2471. Order thereon. (Iowa, South Dakota and Nebraska).
2472. Petition for perpetuation of testimony. (North Dakota).
2473. Order thereon. (North Dakota).

The statutes governing the perpetuation of testimony where suit has not yet been brought, are quite similar in substance in the various states, but differ in essential details. Close attention to the statutes should be paid in any case, as the courts will doubtless require full compliance with all the statutory requirements before allowing the introduction of such testimony in evidence. Accola v. C., B. & Q. R. R. Co., 70 Iowa, 185; 30 N. W. 503. The various provisions on the subject will be found cited in the note.[1]

[1] Wis. Stats. 1913 sec. 4117 *et seq*; Ariz. R. S. 1913 sec. 1721 *et seq*; Ark. Dig. of Stats. 1904 sec. 3196 *et seq*; Cal. C. C. P. 1906 sec. 2083 *et seq*; Colo. Code Ann. 1911 sec. 399 *et seq*; Idaho Rev. Codes 1908 sec. 6116 *et seq*; Iowa Ann. Code 1897 1909 sec. 4718-4723; Kans. Gen. Stats. sec. 5981 *et seq*; Mont. Rev. Codes 1907 sec. 8042 *et seq*; Minn.

2460. Application for perpetuation of testimony of witness within the state (Wisconsin and Minnesota).

STATE OF WISCONSIN.
..... Court ..... County.

In the Matter of the Application of A.... B.... for the perpetuation of the testimony of M.... N....,

[*Venue.*]

A.... B...., being duly sworn, says that he is the owner in fee simple, and entitled to the possession of that certain parcel of land in said county described as follows [*insert description*], and that the said land is now wrongfully occupied and withheld from the plaintiff by C.... D.... and Y.... Z.... [*or otherwise state the plaintiff's title, claim or interest, and the subject in dispute, according to the fact*]. That the names and residences of all persons who are interested or supposed to be interested in the plaintiff's said title and claim, and in the said land, are as follows: C.... D.... of ..... state of .....; Y.... Z.... of ..... state of .....; [and O.... P...., whose residence is unknown]. That one M.... N.... of ..... in said county, knows certain facts concerning plaintiff's said title and claim which the affiant deems material and essential to said title and claim, and affiant therefore desires to perpetuate the evidence of the said M.... N.... * and requests that his deposition be taken, as provided by law for the perpetuation of testimony.

A.... B....

[*Jurat.*]

Gen. Stats. 1913 sec. 8400 *et seq*; Mo. R. S. 1909 sec. 6419 *et seq*; Neb. R. S. 1913 sec. 7987 *et seq*; N. Dak. Rev. Codes 1905 sec. 7308 *et seq*; S. Dak. C. C. P. 1908 sec. 542 *et seq*; Okla. Comp. Laws 1909 sec. 5866 *et seq*; Oregon Laws 1910 sec. 881 *et seq*; Tex. Civ. Stats. Ann. 1913 art. 3653; Utah Comp. Laws 1907 sec. 3466 *et seq*; Wash. Rem. and Bal. Code 1910 sec. 1249 *et seq*; Wyo. Comp. Stats. 1910 sec. 5044 *et seq*.

2461. Notice thereon (Wisconsin and Minnesota).

[*Title as in last form.*]

To C.... D.... of ..... county of ..... state of .....; Y.... Z.... of ..... county of ..... state of ..... [and to O.... P...., whose residence is unknown].

You and each of you are hereby notified that upon the written application of A.... B...., the deposition of M.... N.... of ..... will be taken before the undersigned, judge of the ..... court for the county of ..... state of ....., at his chambers in the courthouse in the city of ..... in said county, on the .... day of ....., 19.., at .... o'clock A. M. of that day, for the purpose of perpetuating the testimony of the said M.... N.... concerning the matter mentioned in the said application of said A.... B....

[*In Minnesota, in case it appears that any of the persons to be notified are non-residents, or for other reason can not be served, add*]: And it appearing satisfactorily that by reason of the non-residence of said O.... P.... [*or other cause*] it will be impossible to serve this notice upon him personally, it is ordered that this motion be published for three successive weeks in the N.... Z...., a newspaper printed and published in the city of ..... county of ..... [*county where applicant resides*], which publication, when completed, shall be equivalent to personal service thereof upon said O.... P....

Dated ....., 19..

J.... K...., Judge, ... Court.

2462. Certificate to same (Wisconsin and Minnesota).

[*The caption and body of deposition may follow Form 2408, with necessary formal changes, and the certificate as follows*]: [*Venue.*]

I, Q.... R...., judge, etc. [*give official title*] hereby certify that the foregoing deposition was taken before me at ..... in the city of ..... in said county, on the .... day of ....., 19..; that it was taken upon the written statement and request of A.... B...., which is hereto attached, and upon verbal interrogatories; that it was reduced to writing by myself [*or* by the defendant, *or* by J.... R...., a disinterested person], in my presence and under my direction; that C.... D...., of ..... and Y.... Z..., of

..... were duly notified to attend upon the taking of said deposition by personal service upon them of the notice hereto attached [and that said notice was duly served upon O.... P...., a non-resident of said state, by publication of the same as therein directed]; that A.... B.... and C.... D.... attended upon the taking of said deposition; that the same was taken in perpetual remembrance of the thing set forth in said written statement of A.... B.... hereto attached; that the said deponent, before examination, was sworn to testify the truth, the whole truth, and nothing but the truth relative to said matter, and that said deposition was carefully read over to [*or* by] said deponent, and then subscribed by him.

[*Date.*] J.... K...., Judge, etc.

2463. Application for commission to perpetuate the testimony of witnesses outside of the state (Wisconsin and Minnesota).

[*The application may follow the first form given in this Chapter, to the *, and then continue*]: and hereby applies to the court for the issuance of a commission to take the testimony of said witness in the manner provided by law.

A.... B....

[*Jurat.*]

2464. Order thereon (Wisconsin and Minnesota).

[*Title as in Form 2460.*] [At a term, etc.]

Application in writing having been duly made to this court by A.... B.... for the issuance of a commission for the perpetuation of the testimony of M.... N.... of ..... state of ..... concerning the matter and claim in said application set forth, and it appearing that C.... D.... of ..... state of ..... and Y.... Z.... of ..... state of ..... are adversely interested in the case and in the applicant's said claim, and are the only persons so interested;

IT IS ORDERED that said application be heard before this court, at the court house in the city of ..... county of ..... on the .... day of ....., 19.., at .... o'clock A. M. of that day, or as soon thereafter as counsel can be heard, and that notice of said application and statement be served on the said C.... D.... and Y.... Z...., by serving upon

each of them a true copy of the same, with a copy of this order, at least fourteen days before the time above fixed for said hearing.

[*In Minnesota, if any adverse party is a non-resident or his residence is unknown, add:* And it is further ordered that notice of the said application be given to the said Y.... Z... who resides out of this state, *or* whose residence is unknown, by publishing a copy of said statement and this notice for three successive weeks, etc. *continue as in Form 2461.*]

[*This order must be made by the court.*]

2465. Commission, return, and certificate, in proceedings for the perpetuation of testimony (Wisconsin and Minnesota).

[*The statutes of both Wisconsin and Minnesota provide that the deposition shall be taken upon written interrogatories and cross-interrogatories, if any be filed, and that it be taken and returned in substantially the same manner as if to be used in an action: the forms given in the last preceding chapter, therefore, may be used with such incidental changes as are made necessary by the fact that the deposition is not taken in an action pending, but only to perpetuate testimony. Wis. Stats. 1913 sec. 4127; Minn. Gen. Stats. 1913 sec. 8410.*]

2466. Application to take deposition for the perpetuation of testimony against all persons (Wis. Stats. 1913 sec. 4130).

[*This proceeding is peculiar to Wisconsin; the application may follow Form 2463, adding at the end thereof the phrase:* "so that the same may be evidence against all persons."]

A.... B....

[*Jurat.*]

2467. Commission thereon (Wisconsin).

[*Title.*]

THE STATE OF WISCONSIN to L.... M...., Esq., of ..... and state of .....

Whereas written application has been duly made by A.... B.... to our said court for the taking of the deposition of M.... N.... of ..... state of ....., in order to perpetuate the testimony of the said M.... N.... with refer-

ence to the matters and claims in said application set forth, and the court being satisfied that there is sufficient cause for the taking of the deposition of said M.... N....; and whereas we, having full confidence in your prudence and ability, have appointed, and by these presents do appoint you a commissioner to examine said M.... N....;

NOW THEREFORE we do authorize, etc. [*follow Form 2413 adding at the end, before the words* "Witness, etc.," *the following*]: You are also hereby directed to publish in the [*name newspaper*], a newspaper published at ..... state of ....., for three successive weeks [*or otherwise, as court deems best*], a notice stating the time and place of the taking of such deposition, with a brief statement of the subject-matter thereof, which notice shall be addressed specially by name to [*name all persons known or supposed to be interested in the case*] and generally to all other persons, in order that they may attend and propose cross-interrogatories to said witnesses [which notice shall also be personally served on, *name persons*] at least .... days before the time appointed for the taking of said deposition.

WITNESS, etc. [*follow attesting clause of Form 2413.*]

2468. Notice of perpetuation of testimony, as against all persons, to be given by commissioner (Wis. Stats. 1913 sec. 4132).

[*Title as in first form in this Chapter.*]

To C.... D.... of ..... state of ..... [*name all others known or supposed to be interested*] and to all other persons.

You and each of you are hereby notified that the deposition of M.... N..., for the purpose of perpetuation of the testimony of said M.... N.... concerning the matter hereinafter named, will be taken by and before the undersigned, as commissioner, at [*name place*], on the .... day of ....., day of ....., 19.., at .... o'clock .. M., and that you and each of you may attend at said time and place and propose cross-interrogatories to said witness.

You are further notified that the subject-matter of said deposition, and of the testimony of said M.... N.... will be the claim of A.... B.... that he is the owner, and entitled to possession of that certain parcel of land [*describe*

same] and that C.... D.... and Y.... Z.... wrongfully occupy and withhold the same [*or state nature of subject, according to the fact.*]

[*Date.*] P.... Q....,
Commissioner.

2469. Return and certificate in proceedings to perpetuate testimony against all persons (Wisconsin).

[*The return and certificate may follow substantially Form 2414, with such incidental changes as are made necessary by the difference in the situation, adding to the certificate the proper clauses showing that notice was given by the commissioner, according to sec. 4132 Wis. Stats. 1913, and the directions of the court.*]

2470. Petition for perpetuation of testimony (Iowa, South Dakota and Nebraska).

[*State and Court.*]

In the Matter of the Application of A.... B.... for the perpetuation of the testimony of M.... N....

To the ..... Court of ..... County, State of .....

THE PETITION of A.... B.... respectfully shows to the court that he is the owner in fee of certain lands [*describing them*] now wrongfully withheld from him by [*name adverse parties*], and that he desires to perpetuate the testimony of one M.... N.... of ..... in said county with reference to the said title and claim of the plaintiff to said lands, and to propound to the said M.... N.... the following interrogatories [*here set forth questions in full*].

That C.... D.... and [*name others, if any*] of ..... are the only persons interested in the said subject-matter of this proceeding [*or if not known by name, describe the persons as devisees, alienees, or otherwise.*]

That your petitioner expects to be the plaintiff [*or* defendant] in an action in a court of this state in which such testimony will, as he believes, be material [*add where petitioner*

expects to be plaintiff] and that the obstacles which prevent the immediate commencement of said action by him, are as follows [*state obstacles*].

WHEREFORE petitioner prays that an order be made allowing the examination of said witness and prescribing the notice thereof to be given, and for such further order as may be just.

A.... B....

[*Add verification.*]

2471. Order thereon (Iowa, South Dakota and Nebraska).

[*Title as in last preceding form.*]
[*Caption.*]

On reading and filing the verified petition of A.... B.... in the above entitled matter, it appearing satisfactorily to the court that the occasion for the taking of the deposition of said M.... N.... is a proper one;

IT IS ORDERED that the examination of the said M.... N...., upon the interrogatories contained in said petition, and such cross-interrogatories as may be filed according to law, be and the same is hereby allowed for the purpose of perpetuating the testimony of the said M.... N.... with reference to the subject-matter named in said petition:

And further ordered that said examination be taken by E.... F...., a notary public, at [*name place*] on [*name time*] and * that C.... D.... and [*name others adversely interested*], be notified of the taking of said testimony by personal service upon each of them of a copy of said petition, and of this order, at least .... days before the day herein set for said examination, [*or if it appears that the interested parties can not be personally notified, substitute after* *]: it satisfactorily appearing to the court that [*name parties adversely interested*], cannot be personally notified, it is

Further ordered that O.... P...., Esq., an attorney of this court, be and he is hereby appointed to examine said petition and prepare and file cross-interrogatories to those contained therein on behalf of said interested parties.

By the Court:
J.... K...., Judge.

[*The return and certificate may be adapted from Forms 2439, 2440 and 2441.*]

2472. Petition for perpetuation of testimony (North Dakota).

[*State and Court.*]

In the Matter of the Application of A.... B.... for the perpetuation of the testimony of M.... N....,

To the Hon. J.... K...., Judge of the ..... Court.

THE PETITION of A.... B.... respectfully shows that he expects to be plaintiff [*or* defendant] in an action in a court of this state, and that he expects that C.... D.... and E.... F.... of ..... in said state will be the adverse parties in said action.

Or: that he is interested as joint tenant in certain real estate [*describing same*], and that it is necessary in order to prove and perfect his title thereto that the fact that he was and is the son and heir at law of one P.... Q.... be proven [*or state the fact as it is*], though no action is now anticipated. That one M.... N.... of ..... county of ..... state of ..... is personally cognizant of the fact of the applicant's said heirship, and that your petitioner expects to prove by said M.... N.... [*here state specific facts*].

WHEREFORE your petitioner prays for an order allowing said examination, and prescribing the proper notice thereof, and for such other order as may be just and proper.

A.... B....

[*Add verification.*]

2473. Order thereon (North Dakota).

[*Title as in last preceding form.*]

Upon reading and filing the petition of A.... B...., it appearing to me that sufficient cause exists therefor:

ORDERED that the examination of the said M.... N.... be, and the same is hereby allowed, and that the deposition of the said M.... N.... for the purpose of perpetuating his testimony with reference to the subject-matter named

in said petition, be taken before E.... F...., a notary public at ..... on ....., 19.., and C.... D... and [*name other adverse parties*] be notified of the taking of said depositions by personal service upon each of them of a copy of this notice, and of said petition at least ..... days before the time fixed for the taking of said depsoition. [*If the adverse parties are unknown, or reside out of the state, the order must prescribe here notice by publication, or otherwise, as the judge directs, instead of personal.*]

It is further ordered that when the said deposition shall have been taken, the said officer taking the same shall duly certify and return the same to C.... K...., Esq., clerk of the ..... court for ..... county, at his office in ..... county of ..... state of North Dakota.

[*Date.*]

J.... K...., District Judge.

[*If the testimony be taken in another state, it must be taken upon commission. For forms, see the preceding Chapter.*]

CHAPTER CXXXV.

NOTICES OF TRIAL.

2474. Notice of trial and note of issue. (Wisconsin).
2475. The same. (Minnesota).
2476. The same. (North Dakota and South Dakota).
2477. Notice of trial. (Iowa).

2474. Notice of trial and note of issue (Wis. Stats. 1913 sec. 2845).

STATE OF WISCONSIN.
..... Court ..... County.

A.... B...., Plaintiff,
vs.
C.... D...., Defendant.

PLEASE TAKE NOTICE that the above entitled action will be brought to trial at the ..... term of the aforesaid court, to be held at the court house in the .... of ..... in the said county of ..... on the .... day of ..... next, at the opening of court on that day, or as soon thereafter as counsel can be heard.

Dated ....., 19.. Yours, etc.,

E.... F....,
Plaintiff's Attorney.

To G.... H....,
Attorney for Defendant.

[*Admission of service of above*]: Service of a copy of above notice admitted this .... day of ....., 19..

G.... H....,
Defendant's Attorney.

[*The note of issue is usually attached to the notice of trial as follows*]:

Note of Issue in the above Entitled Cause.

E.... F...., Plaintiff's Attorney.

G.... H...., Defendant's Attorney.

Issue of fact [*or* law] for jury [*or* court]. Joined ....., 19..

Filed by E.... F...., Plaintiff's Attorney, ..., 19..

M.... N...., Clerk.

2475. The same (Minn. Gen. Stats. 1913 sec. 7793).

[*The notice of trial may follow the last preceding form and the note of issue as follows*]:

[*Title of cause.*]

Note of Issue.

Issue of [fact *or* law] for [court *or* jury].

Last pleading served ....., 19..

E.... F...., Attorney for Plaintiff.

G.... H...., Attorney for Defendant.

Filed....., 19..

C.... K...., Clerk.

2476. The same (N. Dak. Rev. Code sec. 7011; S. Dak. C. C. P. 1908 sec. 246).

[*The notice of trial and note of issue may follow the Minnesota form last given.*]

2477. Notice of trial (Iowa Code 1907 sec. 3658).

[*In Iowa notice of trial is only required in an action which has been continued after issue joined. Iowa Code 1907 sec. 3658; Erickson v. Barber, 83 Iowa, 367; 49 N. W. 838. The notice when necessary may doubtless follow the first form given in this chapter for use in Wisconsin.*]

CHAPTER CXXXVI.

CONTINUANCE OR POSTPONEMENT OF TRIAL.

2478. Affidavit for continuance because of absence of witnesses. (Wisconsin).

2479. The same, for unexpected absence or illness of witness.

2480. Affidavit for continuance because of absence of documentary evidence. (Wisconsin).

2481. Affidavit for continuance because of sickness of sole counsel.

2482. Motion for continuance. (Iowa).

2483. Order continuing or postponing trial.

Applications to postpone the trial of a cause to a subsequent term or to a future day in the current term are addressed to the sound discretion of the court. In general terms it may be said that such applications must be accompanied by proof showing that the party applying has used due diligence to prepare for trial and also what diligence has been used; that he can not safely proceed to trial without certain evidence or witnesses which are not at hand and cannot be at hand if the trial proceeds at once; that due effort has been used [describing it] to procure such evidence, or the attendance of such witnesses; the names and residences of such witnesses, and what facts [as distinguished from legal conclusions] they will swear to, and the reasons of the applicant for his belief that they will so swear; also sufficient facts showing reasonable grounds to believe that such testimony or witnesses can be obtained if the action be continued as requested, and that there are no other documents or witnesses which can be procured by whom the facts can be proven.

The procedure is governed in some states entirely by statute and in others by rules of court in addition to the statutes. No motion should be made without carefully consulting the statutes and rules of court of the particular state.

2478. Affidavit for continuance because of absence of witnesses (Wisconsin).

[*Title of court.*]

A.... B...., Plaintiff,
vs.
C.... D...., Defendant.

[*Venue.*]

C.... D...., being first duly sworn, says that he is the defendant in the above entitled action; that issue was joined therein on the .... day of ....., 19.., and that this defendant has a valid defense in whole in said action [*or* in part, *specifying which part*].

That this affiant has fully and fairly stated the case to G.... H...., Esq., his counsel herein, who resides at ..... in said county, and that upon the statement thus made he is advised by said counsel that he has a valid and substantial defense to said action and the whole thereof, [*or to some specific part thereof, stating what part.*]*

That affiant has used due diligence to prepare for trial of this action at the present term; that he caused a subpoena to be issued herein on the .... day of ....., 19.., for service on L.... M.... and O.... P.... [*or otherwise state what efforts were made to procure the attendance of the witnesses*]; that the sheriff of said county to whom said subpoena was on that day delivered, informs this affiant that said M.... N.... and said O.... P.... are now absent from this state and somewhere in ..... state of ....., having left this state about ....., 19..; that their residence in this state is the town of .....county of ....., and defendant has made inquiry in the neighborhood of their residence and is informed that they are temporarily absent, but not expected to return for about ..... months.**

That said M.... N.... and O.... P.... are necessary and material witnesses without whose testimony he cannot safely proceed to trial; and that no other evidence is at hand, nor witness nor witnesses in attendance or known to him,

whose testimony could have been procured in time, upon whom he can safely rely to prove the particular facts that he expects to prove and believes can be proved by such absent witnesses above named, to maintain the issue in respect thereto on his part.

That after fully and fairly stating to his said counsel the facts which he expects to prove by said absent witnesses he is advised by his said counsel and verily believes that he can not safely go to trial without the testimony of each of them.

That neither of said witnesses is absent by this affiant's consent, connivance or procurement; that they left without his knowledge; and soon after the joining of issue herein, each of them told this affiant personally that he expected to be in ..... county when the ..... term of this court should be held, and for that reason this affiant took no steps to procure their depositions to be used upon the trial hereof.

Affiant further says, that he expects to prove by said M.... N.... the following facts, viz. [*here state facts*] and by said O.... P.... the following facts [*state same*].

That the grounds of his expectation that he can prove such facts by said witnesses are as follows [*state grounds as for instance*, that each of said witnesses has stated to affiant that they could and would testify to said facts, *or otherwise according to the fact*].

Affiant further says that if a continuance of the trial of this action [*or* a postponement of the trial until ....., 19..] be granted he will be able as he believes and intends to procure the attendance of said witnesses [*or* will take the depositions of said witnesses for use on the trial].

C.... D....

[*Jurat.*]

2479. The same, for unexpected absence or illness of witness.

[*Proceed as in last preceding form, substituting between * and ** the following*]:

That affiant has used due diligence to prepare for the trial of this action at the present term, that he expected to call as a witness on said trial one M.... N...., and that, two weeks before the first day of the present term affiant went to the residence of said witness, in the town of ....., in the county

of ....., for the purpose of subpoenaing him to attend as a witness in said action, at said circuit; that he there learned that said witness had unexpectedly left home the day before, in order to go to the state of ....., and intended to remain there about two months; and deponent further says, he had no knowledge that said witness was going to be absent from home, until he learned it when he went to subpoena said witness, as aforesaid;

[*Or*, That one M.... N...., who resides at ....., was, on the .... day of ..... last past, duly subpoenaed to attend the trial of this action; but that since the service of the said subpoena he has become seriously ill, and is now wholly unable to attend this court, or be present at the trial of this action in its order on the calendar. But deponent has been informed by R.... S...., the physician attending the said witness, and verily believes, that the said witness will be able to attend this court by the time of the next circuit, appointed to be held at, etc.]

[*Make such incidental changes in the other statements of the preceding form as are necessary.*]

2480. Affidavit for continuance because of absence of documentary evidence (Wisconsin).

[*Title of court and cause.*]

[*Proceed as in first form in this chapter to the *, continuing as follows*]: That there are in existence certain written books [*or* documents, *describing them, e. g.*, consisting of the business account books kept by the plaintiff in his business during the year 19..] without examination and production of which upon the trial affiant cannot safely proceed to the trial of this cause as he is advised and verily believes after fully and fairly stating to his said counsel the facts which he expects to prove by said books [*or* documents].

That said books [*or* documents] are now, as he is informed and verily believes [*state where and in whose custody they are believed to be*], that they are not absent by the affiant's procurement, consent or connivance; that up to the .... day of ....., 19.., said books were [*state where*] and could have been produced here upon the trial of this case and affiant relied upon such fact and was not informed of their removal nor did he learn thereof until the .... day of ....., 19..,

when it was too late to secure their return; that said books [*or* documents] contain entries made by the plaintiff showing credits for money paid by the defendant to the plaintiff upon the cause of action stated in the complaint [*or otherwise state the nature and contents of the books or documents*] and that affiant expects to prove thereby [*here state the facts to be proven fully*]. That the grounds of his expectation that he can prove such facts by said books are as follows [*here state grounds*].

That the affiant has used his best exertions to procure the presence of said books upon the trial; that he [*here state what efforts were used as by giving notice to produce or otherwise, or if the opposing party gave assurance of their production, state the fact*].

That if a continuance of the trial of this cause be granted affiant will be able to produce said books at the next term of this court or will be able to prove their contents by the taking of depositions.

A.... B....

[*Jurat.*]

2481. Affidavit for continuance because of sickness of sole counsel (Rice v. Melendy, 36 Iowa, 166).

[*Proceed as in first form in this chapter to the* *.] That affiant has used due diligence to prepare for the trial of this case at the present term [*state diligence used*]. That said G.... H...., Esq., was and is his sole counsel in the case and is the only attorney conversant with the facts of the case, and that said G.... H.... was fully prepared and was relied upon by affiant to try said case at this term but that on or about the .... day of ....., 19.., said G.... H.... was taken seriously ill and has been ever since that time and now is very ill and most of the time in a delirious condition and that all conversation with him upon business matters has been prohibited by the physician in charge of the case.

That said G.... H.... has possession of all of the papers in said case including [*here state, if there are any, important documents and their nature*], and that it is and has been impossible for any other attorney to become cognizant of the facts of said case and to prepare for trial thereof at this term, because of the condition of the said G.... H...., and be-

cause of the complexity of the case and the many questions involved. That said case involves [*here state facts at length showing any peculiar difficulty or complexity in the case and any other material facts tending to show impossibility of another attorney being able to prepare for the trial*].

That said G.... H.... is now improving in health and that affiant fully believes that if a postponement of the trial of this case be granted, said G.... H.... will be able to try the same at the next term, and that if this should be impossible affiant will be able to procure, and will procure, another attorney to try said cause.

C.... D....

[*Jurat.*]

[*Add corroborating affidavit by physician.*]

[*For case of postponement on account of other engagements of sole counsel, see McArthur v. Slauson, 60 Wis. 293; 19 N. W. 45.*]

2482. Motion for continuance (Iowa).

[*Title of action.*]

Now comes the defendant in the above entitled action and moves the court to continue the trial thereof to the next term of this court [*or to some stated time later in the term*], upon the affidavit of C.... D...., attached hereto and made a part hereof.

C.... D....,
Attorney for Defendant

[*Attach the affidavit.*]

2483. Order continuing or postponing trial.[1]

[*Title.*] [*Caption.*]

On reading and filing the affidavit of C.... D...., and on motion of O.... P...., of counsel for ...., and L.... M...., of counsel for .... [*or*, no one appearing], in opposition:

ORDERED, that the trial of this action be postponed until the .... instant, on the payment within three days from

[1] This order is very frequently simply pronounced orally from the bench in the presence of the parties and entered in the minutes. A written order, however, may be taken and may be advisable when there are conditions affixed in order that there may be no doubt as to its terms.

date of ten dollars costs [*or*, to the .... term of this court, on the payment of costs of the present term to be taxed *instanter*,[2] and, *here state other terms, if any, imposed, such as,* on the defendant's consenting that the testimony of M.... N.... be taken conditionally before S.... T...., referee, on .... days' notice].

[*Date.*] By the Court,

J.... K...., Judge.

[2] In Wisconsin when an act is directed to be performed instanter it is required to be done before the expiration of the day on which the order was made (circuit court rule XII sec. 2).

CHAPTER CXXXVII.

TRIAL BY JURY.

2484. General verdict.
2485. Verdict for defendant on plaintiff's claim and on counterclaim.
2486. Verdict for excess, both parties having proved a cause of action.
2487. Verdict subject to opinion of the court. (Wisconsin).
2488. Verdict in replevin for the plaintiff.
2489. The same, where plaintiff has only special property.
2490. Verdict in replevin for defendant.
2491. Verdict for plaintiff in replevin. (Iowa).
2492. General verdict for plaintiff in ejectment. (Wisconsin).
2493. Separate verdict in ejectment for defendant's improvements, when plaintiff recovers the land. (Wisconsin).
2494. The same, when a part only of the plaintiffs recover. (Wisconsin).
2495. The same, for a part of the premises only. (Wisconsin).
2496. Special verdict. (Wisconsin).
2497. General verdict with findings on particular questions. (Wisconsin).
2498. Verdict in milldam action. (Wisconsin).
2499. Notice of motion for trial of issues of fact in equitable case, or issues not made by the pleadings, before a jury.
2500. Verdict in action for cutting timber where defendant claims cutting was by mistake. (Wisconsin).
2501. Order for trial of issues in equitable action before jury.
2502. Notice of motion for a special jury.

2484. General verdict.

[*Title.*]

We, the jury in the above entitled action, find for the plaintiff and assess his damages at ..... dollars [*or* find for the defendant].

Dated ....., 19.. O.... P...., Foreman.

2485. Verdict for defendant on plaintiff's claim and on counter-claim.

[*Title.*]

We, the jury in this action, find for the defendant upon the cause of action stated in the complaint, and also find for the

defendant upon his counter-claim and assess his damages thereon at ..... dollars.

Dated ....., 19.. O.... P...., Foreman.

2486. Verdict for excess, both parties having proved a cause of action.[1]

[*Title.*]

We, the jury in this action, find for the plaintiff on the cause of action stated in the complaint and that there is due thereon ..... dollars, and we also find for the defendant on the counter-claim, stated in the answer and that there is due thereon ..... dollars, and we assess the damages of the defendant [*or* plaintiff] at the sum of ..... dollars, being the amount of the excess due him upon the above findings.

2487. Verdict subject to opinion of the court (Wis. Stats. 1913 sec. 2857).[2]

Title.]

We, the jury in this action, find for the plaintiff and assess his damages at ..... dollars [*or* for the defendant] as directed by the court, and subject to the opinion of the court upon the questions of law.

Dated ....., 19.. O.... P...., Foreman.

2488. Verdict in replevin for the plaintiff.

[*Title.*]

We, the jury in this action, find for the plaintiff that he is entitled to a return of the property described in the com-

[1] It is held in Edleman v. Kidd, 65 Wis. 18, 26 N. W. 116, that in case of an action on money demand to which a counter-claim is interposed it is unnecessary to state in the verdict the amount due on each but that a general verdict may be rendered by the jury for the balance found due to the party whose claim is found to be the larger.

[2] It is provided by Wis. Stats. 1913 sec. 2857, that where upon the trial *the case presents only questions of law* the court may in its discretion direct the jury to render a verdict subject to the opinion of the court. Such a verdict is only to be directed when the material facts are undisputed and only questions of law remain to be considered. It should appear either by the record or by the verdict itself that it was rendered "subject to the opinion of the court" and in that event judgment may be rendered for either party as the court determines the law to be. Davis v. Pioneer Fur Co., 102 Wis. 394; 78 N. W. 596.

plaint [*or describe the property recovered*] and assess the value of said property at ..... dollars, and the plaintiff's damages by reason of the detention [*or* taking and withholding] of said property ..... dollars.

Dated ....., 19 O.... P...., Foreman.

2489. The same where plaintiff has only special property.

[*Title.*]

We, the jury in this action find for the plaintiff that he is the owner of a special interest in the property described in the complaint herein to-wit, [*describe the interest with legal certainty*]; that the value of said property is ..... dollars and the value of plaintiffs special interest therein is ..... dollars and that plaintiff is entitled to immediate possession of said property by virtue of his said special interest therein; that the defendant is the general owner of said property subject to plaintiff's said special interest; and we assess the plaintiff's damages by reason of the taking and withholding of said property at ..... dollars.

O.... P...., Foreman.

2490. Verdict in replevin for defendant.

[*Title.*]

We, the jury in this action, find for the defendant, that he is entitled to a return of the property described in the complaint [*or describe the property*] and assess the value thereof at the sum of ..... dollars, and the defendant's damages by reason of the taking, withholding and detention of the same at the sum of ..... dollars.

Dated ....., 19..

O.... P...., Foreman.

2491. Verdict for plaintiff in replevin (Iowa Code 1897 sec. 4175).

[*Title.*]

We, the jury in this action, find for the plaintiff, that he is the absolute owner of the personal property described in the complaint [*or* that he has a qualified ownership in the property described in the complaint by virtue of a levy thereon made by him as sheriff under an execution held by him against the property of ..... *or otherwise briefly describe*

the qualified title]; and that said plaintiff is entitled to the immediate possession of said property; that said property is of the value of ..... dollars [*or* is of the following value; *here name each article and give its value separately*]; that the plaintiff's special interest in said property is of the value of ..... dollars; and we assess the plaintiff's damages for the wrongful detention of said property at ..... dollars.

Dated ....., 19..

O.... P. ..., Foreman.

2492. General verdict for plaintiff in ejectment (Wis. Stats. 1913 sec. 3084).

[*Title.*]

We, the jury in this action, find for the plaintiffs, that they are the owners of an estate in fee simple [*or* an estate for the life of A.... B.... *or otherwise specify the particular estate and its duration*] in the lands described in the complaint and have a right to recover the possession of the same, and we assess their damages for the unlawful withholding thereof at the sum of ..... dollars, and [*if special damage be claimed in the complaint*] we further assess the plaintiff's damages for waste committed thereon at the sum of ..... dollars.

Dated ....., 19..

O.... P...., Foreman.

[*If the plaintiff had title at the time the action was commenced which has terminated pending the action the verdict should state both facts and date of the termination and assess damages only to that date.*]

2493. Separate verdict in ejectment for defendant's improvements, when plaintiff recovers the land (Wis. Stats. 1913 sec. 3097).

[*Title.*]

We, the jury in this action, find the defendant entitled to recover, upon his counter-claim herein, the value of the improvements made and taxes paid by him upon the said premises and assess the amount thereof at ..... dollars.

O.... P...., Foreman.

[*This is to be returned with the general verdict for the plaintiff but separate therefrom.*]

2494. The same, when a part only of the plaintiffs recover (Wis. Stats. 1913 sec. 3084).

[*Title.*]

We, the jury in this action, find for the plaintiffs A.... B.... and C.... D.... that they are the owners, etc. [*proceed as in last preceding form to the assessment of damages*] and we assess said last named plaintiff's damages [*proceed as in last preceding form*] and as to the plaintiffs E.... F.... and G.... H.... we find for the defendants.

Dated ....., 19..

O.... P...., Foreman.

2495. The same, for a part of the premises only (Wis. Stats. 1913 sec. 3084).

[*Title.*]

We, the jury in this action, find for the plaintiff that he is the owner in fee simple [*or otherwise describe the estate as in preceding forms*] in and to a part of the premises described in the complaint, to-wit [*here describe the part recovered*], and we assess his damages [*as in preceding forms*], and as to the remainder of the premises described in the complaint we find for the defendant.

Dated ....., 19..

O.... P...., Foreman.

2496. Special verdict (Wis. Stats. 1913 sec. 2858).[3]

[*Title.*]

We, the jury in this action, find the following special verdict in said action:

Question 1. [*Insert question.*]

Answer. [*Insert answer.*]

Question 2. [*Insert question.*]

Answer. [*Insert answer.*]

[*Proceed in the same manner with all of the questions.*]

Dated ....., 19..

O.... P...., Foreman.

[3] In case a special verdict be demanded it is improper to submit a general verdict in connection therewith, and erroneous if proper objection and exception be taken. Ward v. C. M. & St. P. Ry. Co., 102 Wis. 215.

2497. General verdict with findings on particular questions (Wis. Stats. 1913 sec. 2858).

[*Title.*]

We, the jury in this action, find for the plaintiff and assess his damages at ..... dollars [*or* find for the defendant] and we further find in answer to questions submitted by the court as follows:

Question 1. [*Insert question.*]

Answer. [*Insert answer.*]

[*Proceed as above with remaining questions.*]

Date ....., 19..

O.... P...., Foreman.

2498. Verdict in milldam action (Wis. Stats. 1913 sec. 3381).

[*Title.*]

We, the jury in this action, find the following special verdict in said action:

Question 1. Is the plaintiff entitled to recover damages for the maintenance of the dam described in the complaint?

Answer. .....

Question 2. If yes, then what is the amount of such damages for the period commencing [three years prior to the commencement of this action down to the present time] [*or, when plaintiff's title accrued within said three years*, Jan. 1st, 19.. (*date when title accrued*) to the present time]?

Answer. .....

Question 3. [*If plaintiff alleges that the dam is of unreasonable height*]: Is the said dam raised to an unreasonable height?

Answer. .....

Question 4. If you answer the last preceding question "Yes" then state how much the dam should be lowered.

Answer. .....

Question 5. [*If plaintiff alleges that dam ought not to be closed during whole year*]: Should said dam be kept up, or closed, during the whole year?

Answer. .....

Question 6. If you answer last preceding question "No" then state what part of the year it shall be left open?

Answer. .....

Question 7. If you have answered the first question in this verdict in the affirmative, then state what sums paid annually to the plaintiff will be a just and reasonable compensation for the damages which will be hereafter occasioned by the dam so long as it is used in conformity with this verdict?

Answer. .....

Question 8. If you have answered the first question in this verdict in the affirmative then state what gross sum would be a just and reasonable compensation for all the damages hereafter to be occasioned by such use of the dam and for the right of maintaining and using the same forever in the manner aforesaid.

Answer. .....

O.... P...., Foreman.

2499. Notice of motion for trial of issues of fact in equitable case, or issues not made by the pleadings, before a jury.[4]

[*Title.*]

Take notice that upon the pleadings in this action and upon the proceedings on file [and upon the affidavit of G.... H.... herewith served] the undersigned will move the ..... court at ..... on the .... day of ....., 19.., at .... o'clock A. M., or as soon thereafter as counsel can be heard, for an order that the following issues be submitted to a jury for trial, viz.:

I. [*State the issue in succinct form.*]

[*Date.*]

G.... H....,
Attorney for Plaintiff.

[*Address.*]

[4] The court may in its discretion order issues in equitable actions to be tried by a jury, also issues of fact not made by the pleadings. Wis. Stats. 1913 sec. 2841, 2843. In equitable actions the verdict is advisory only and the court may order a new trial or find the facts himself. Stahl v. Gotzinberger 45 Wis. 121; Welch v. Tippery 66 Neb. 604: 92 N. W. 582. In Arizona if a jury be demanded by either party in actions for equitable relief, the court shall submit to the jury all controverted questions of fact, interrogatories being framed and approved by the court. Ariz. R. S. 1913 sec. 509, 542. In the following states any issue may by order of the court be tried by a jury: Ark. Dig. of Stats. 1904 sec. 5995, 6171; Cal. C. C. P. 1906 sec. 592; Colo. Code Ann. 1911 sec. 190; Kans. Gen. Stats. 1909 sec. 5873; Mont. Rev. Codes 1907 sec. 6724; Minn. Gen. Stats. 1913 sec. 7792; Mo. R. S. 1909 sec. 1969; Neb. R. S. 1913 sec. 7844; N. Dak. Rev. Codes

2500. Verdict in action for cutting timber where defendant claims cutting was by mistake (Wis. Stats. 1913 sec. 4269).

[*Title.*]

We, the jury in this action, find generally for the plaintiff, and we further find:

I. That the cutting of timber set forth in the complaint was [*or* was not] done by mistake as alleged by the defendant.

II. That the true value of such timber when so cut was the sum of ..... dollars.

III. That the highest market value of the same [*or* of the lumber manufactured therefrom] while in defendant's possession before this trial is the sum of ..... dollars.

L.... M...., Foreman.

2501. Order for trial of issues in equitable action before jury.

[*Title.*] [*Caption as in Form 8.*]

The motion of the plaintiff herein for an order submitting certain issues to a jury for trial having come on to be heard upon the pleadings herein [and the affidavit of G.... H....] and [*state any further affidavits or papers used on the motion*], after hearing G.... H...., Esq., for the motion and J.... K...., Esq., in opposition.

ORDERED that the following issue between the parties be tried by a jury at the .... term of the said court to be held at ..... on the .... day of ....., 19.. [*or* at the present term of this court], viz.:

[*State issue clearly and succinctly*].

By the Court:

O.... P...., Judge.

2502. Notice of motion for a special jury.[5]

[*Title.*]

Take notice, that upon the affidavit of which a copy is

1905 sec. 7009; S. Dak. C. C. P. 1908 sec. 244; Okla. Comp. Laws 1909 sec. 5786; Tex. Civ. Stats. Ann. 1913 art. 1948; Utah Comp. Laws 1907 sec. 3128; Wyo. Comp. Stats. 1910 sec. 4454.

[5] There were formerly provisions in both Wisconsin and Minnesota giving any party the right to trial before a special or struck jury on demand, but these provisions have been repealed. The special or struck

herewith served upon you, and upon the pleadings [*specify any other papers relied on*] in this action, the undersigned will move the court, at a special term to be held at the court house in ....., in the county of ....., on the .... day of ....., 19.., at ..... o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order that a special jury be struck for the trial of this action, and for such other or further relief as may be proper.

[*Date.*]

L.... M....,
Plaintiff's Attorney.

To ....,
Attorney for .....

jury had its origin at common law and was granted in cases which were shown to be of too great difficulty for submission to ordinary freeholders. Such a jury is rarely granted now in the absence of direct statutory provision. See a discussion of the subject in Lommen vs. M. G. Co., 65 Minn 196; 68 N. W. 53; see also 24 cyc. 96.

CHAPTER CXXXVIII.

REFERENCES AND TRIAL BY REFEREES.

2503. Affidavit by plaintiff to move for reference of an action involving a long account.
2504. The same, by defendant.
2505. Notice of motion to refer cause.
2506. Order to show cause why reference should not be ordered.
2507. Affidavit to oppose motion, denying account.
2508. Affidavit to oppose motion, where fraud is set up.
2509. Affidavit to oppose motion, where there are difficult questions of law.
2510. Stipulation to refer.
2511. Order referring the cause on motion.
2512. Order referring the cause, without motion.
2513. Order of reference upon written stipulation.
2514. Order of reference. (Iowa).
2515. Order of reference to take testimony as to the value of use and occupation in action for specific performance.
2516. Order of reference to take an account as to damages.
2517. Order of reference to take an account between parties to a mortgage, in an action to redeem.
2518. Order of reference for accounting in partnership cause.
2519. Order of reference to determine priority among creditors.
2520. Order of reference to take all testimony and report to the court.
2521. Plaintiff's account, to be presented on reference.
2522. Order that books and papers be deposited with referee before accounting.
2523. Oath of referee.
2524. Oath of referee. (Minnesota).
2525. Oath of referee. (Iowa and Nebraska).
2526. The same. (North Dakota).
2527. The same. (South Dakota).
2528. Appointment of first meeting, by referee.
2529. Notice of hearing or trial, by party.
2530. Report of referee, general form.
2531. Report in partnership cause.
2532. Referee's report on accounting in partnership cause.
2533. Referee's report as to priority of creditors.
2534. Notice of claim to surplus in foreclosure. (Wisconsin).
2535. Affidavit to move for reference of claim to surplus in foreclosure.
2536. Notice of motion for reference to obtain surplus moneys on foreclosure sale.
2537. Order of reference of claims to surplus moneys.
2538. Referee's report thereon.
2539. Notice of motion for payment.

2540. Order distributing surplus moneys on foreclosure.
2541. Notice of filing report of referee.
2542. Exceptions to report.
2543. Motion to confirm report of referee and for judgment.
2544. Motion for further report.
2545. Motion to set aside report and for a new trial.
2546. Order confirming, setting aside, or amending referee's report.

While the statutes of the various states differ in detail with regard to the ordering of references, they substantially agree upon the following general propositions. A reference may be ordered to try any or all of the issues upon consent of the parties; it may also be compulsorily ordered (1) where it appears that a long account must necessarily be examined upon either side, (2) where the taking of an account is necessary for the information of the court, and (3) where a question of fact other than upon the pleadings arises in the action.[1]

2503. Affidavit by plaintiff to move for reference of an action involving a long account.[2]

[*Title.*]
[*Venue.*]

A.... B...., the plaintiff in the above-entitled action, being duly sworn, says:

That said action is brought to recover [*here briefly designate nature of cause of action, as for instance*]: for goods, wares and merchandise sold and delivered by plaintiff to de-

[1] Wis Stats. 1913 sec. 2864; Oregon Laws 1910 sec. 160, 161; Utah Comp. Laws 1907 sec. 3172, 3173; Wash. Rem. and Bal. Code 1910 sec. 369, 370; Mo. R. S. 1909 sec. 1995, 1996, 2013; N. Dak. Rev. Codes 1905 sec. 7046, 7047; S. Dak. C. C. P. 1908 sec. 281, 282. In the following states the report of the referees upon the whole issue stands as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court; when the referee is to report the facts, the report has the effect of a special verdict; Ariz. R. S. 1913 sec. 664, 665, 667; Cal. C. C. P. 1906 sec. 639, 644, 645; Colo. Code Ann. 1911 sec. 222, 223, 231; Idaho Rev. Codes 1908, sec. 4414, 4415, 4421; Iowa Ann. Code 1897 sec. 3734, 3735, 3740, 3741; Kans. Gen. Stats. 1909 sec. 5892, 5893, 5894; Mont. Rev. Codes 1907 sec. 6771, 6772, 6781; Minn. Gen. Stats. 1913 sec. 7820, 7821, 7823; Neb. R. S. 1913 sec. 7867, 7868, 7869; Okla. Comp. Laws 1909 sec 5810, 5811, 5812; Wyo. Comp. Stats. 1910 sec. 4520, 4521, 4523.

[2] The affidavit should be made by a party or excuse be stated in it. Wood. v. Crowner, 4 Hill 548. Joinder of issue should be stated. Jansen v. Tappen, 3 Cowen 34.

fendant, at his request, at various times between the .... day of ....., 19.., and the .... day of ....., 19.., as more fully appears from the complaint herein.

That issue was joined on [*or*, as of] the .... day of ....., last, by the service of defendant's answer, setting up [*here designate the defenses,—e. g., thus*] payment as to part, and a counter-claim arising out of several items of services alleged to have been rendered by him to the plaintiff.

That the trial of the aforesaid issue will require the examination of a long account on the side of the plaintiff [*or*, defendant, *or*, both parties], consisting of at least .... items of charges and [credits] of the aforesaid [goods and services] of various dates.

A.... B....

[*Jurat.*]

2504. The same, by defendant.

[*Title.*]

[*Venue.*]

C.... D... being first duly sworn says that he is the defendant in this action; that the same is brought by the plaintiff on an account for goods, wares and merchandise, alleged to have been heretofore sold and delivered to this defendant; that issue was joined herein on the .... day of ....., 19.., by the service of the defendant's answer, in which the defendant denies the sale and delivery of a part of the said goods and merchandise and alleges payment as to the balance thereof and also alleges as a counter-claim that the plaintiff is indebted to this defendant upon an account for work, labor and services rendered.

That by the bill of particulars of the plaintiff's claim heretofore served herein, the same contains .... items, all of which [*or state how many*] this defendant, by his answer, controverts.

That the items of this defendant's counter-claim embrace an account of .... separate items, and that the trial of this issue will require the examination of a long account, namely, the said account of the said plaintiff, and also of this affiant as aforesaid.

That no difficult questions of law are, to the best of this affiant's knowledge and belief, involved in the said issues in this action.

C.... D....

[*Jurat.*]

2505. Notice of motion to refer cause.

[*Title of the cause.*]

Please take notice, that on [*designate papers*], the undersigned will move the court, at a .... term to be held at ....., on the .... day of ....., 19.., at .... o'clock in the .... noon, or as soon thereafter as counsel can be heard, that this action be referred to a referee [*or* to three referees] to hear, try and determine the same.

[*Date.*]

L.... M....,
Plaintiff's Attorney.

To O.... P...., Esq.,
Defendant's Attorney.

2506. Order to show cause why reference should not be ordered.

[*Title.*]

Upon the affidavit of A.... B...., and on reading the pleadings on file herein, and on motion of L.... M...., Esq., attorney for defendant,

ORDERED, That the ..... herein show cause, at the court house in the city of ..... in said county, on the .... day of ....., 19.., at the opening of court on that day, or as soon thereafter as counsel can be heard, why the order of reference applied for herein should not be granted;

That a copy of this order and said affidavit be served on the plaintiff's attorney, at least .... hours before the time fixed for the hearing of such motion.

O.... P....,
Circuit Judge.

2507. Affidavit to oppose motion, denying account.

[*Title.*]

[*Venue.*]

C.... D.... being duly sworn says that he is the defendant in this action and that the issue joined herein will not

require the examination of a long account within the meaning of the statute.

That this action is brought to recover for a bill of goods sold by plaintiff to defendant; and that all of said goods were sold at one time, and as one transaction, and the alleged credit is a payment made by defendant at said time, and then deducted from the amount to be due from defendant to the plaintiff; and there are no other items of charge or credit involved in the issues herein.

C.... D...

[*Jurat.*]

2508. Affidavit to oppose motion, where fraud is set up.

[*Commencement as in last preceding form*] that this action is brought upon an insurance policy alleged to have been made by defendants; and that the only items of account are the items of damage, which plaintiff claims he has sustained by a peril insured against.

That the defence [*or*, one of the defences] set up by the defendants is fraud on the part of the plaintiff, in [*here briefly disclose it*], as more fully appears by reference to their answer herein.

C.... D....

[*Jurat.*]

2509. Affidavit to oppose motion, where there are difficult questions of law.[3]

[*Commencement as in preceding forms*] that he has fully and fairly stated the case in this cause to his counsel O.... P...., who resides at No. ...., ... street, in the city of .....; and that the investigation and trial of the issues of fact in this cause will, as deponent is advised by said counsel, after such statement, and believes, require the decision of difficult questions of law.

That [*here state, unless the moving affidavits correctly state it the nature of the issue*, and that] the following will be insisted on on behalf of said plaintiff [*here briefly state deponent's*

[3] Where an action contains important issues requiring the discretion, experience and judgment of the court it should only be referred "to take an account for the information of the court." Druse v. Herter, 57 Wis. 644; 16 N. W. 14.

points of law]. And deponent is informed and believes that the defendant's counsel will urge [*here briefly state his anticipated points*]; which points, as deponent is advised by his said counsel, are material to the cause, and are difficult, especially in their application to the facts of this case.

C.... D....

[*Jurat.*]

2510. Stipulation to refer.

[*Title.*]

It is hereby stipulated and agreed by the parties to this action [that the right of trial by jury be waived, and that] it be referred to R.... F...., Esq., of ....., counsellor-at-law, to hear, try and determine the issues in this cause; and that an order may be entered accordingly.

[*Date.*]

A.... B...., Plaintiff's Attorney.
C.... D...., Defendant's Attorney.

2511. Order referring the cause on motion.

[*Title.*]

On reading and filing [the pleadings and the affidavit of G.... H....], and on motion of M.... N...., counsel for defendant, and after hearing O.... P...., counsel for plaintiff [*or*, and on proof of service of notice of motion, and no one appearing], in opposition:

ORDERED, that it be referred to R.... F...., Esq., of ....., counsellor-at-law, to hear, try and determine the whole issues in this cause.

[*Date.*] By the Court:
L.... M...., Judge.

2512. Order referring the cause, without motion.

[*Title.*]

This cause coming on to be tried, and it appearing to the satisfaction of the court that it will require the examination of a long account:

ORDERED [*as in preceding form*].

2513. Order of reference upon written stipulation.

[*Title.*]

On reading and filing the annexed consent, and on motion of M.... N.... for plaintiff [*or*, defendant]:

ORDERED [*as in last preceding form*].

2514. Order of reference (Iowa).

[*Title.*]

[*Commencement as in preceding forms of orders of reference, or if parties have orally agreed in open court*] the parties to this action having orally agreed in open court that the same be referred to the person [*or* persons] hereinafter named to hear, try and determine the same,

ORDERED that said action be and the same hereby is referred to R.... F.... and R.... E...., referees, to hear, try and determine all the issues therein and to report at this [*or* the next] term of this court, and that the cause be heard at ..... upon ten day's written notice [*or* commencing on the .... day of ....., 19..]

[*Date.*]

By the Court:

L.... M...., Judge.

2515. Order of reference to take testimony as to the value of use and occupation in action for specific performance.

[*Title.*] [*Caption as in Form 8.*]

ORDERED, after hearing counsel for the plaintiffs and defendants, that it be referred to R.... F...., Esq., to take such testimony as may be produced before him by either party to this cause in relation to the value of the use and occupation, by C.... D...., of the premises [*briefly designating them*], since the .... day of ....., 19.., and the amounts received and collected by C.... D...., or which, with reasonable diligence, might have been received and collected for the same since said day, the amounts expended by said C.... D.... for taxes, assessments, repairs, or otherwise, in and upon said premises [and also in relation to all policies of insurance upon said premises, and as to any actions brought upon the same].

And it is further ordered, that the said referee report said testimony with all convenient speed.

2516. Order of reference to take an account as to damages.

[*Title.*] [*Caption as in Form 8.*]

This cause coming on to be tried, and it appearing that the taking of an account is necessary for the information of the court before judgment; thereupon, on hearing counsel for the respective parties,

ORDERED, that it be referred to R.... F...., Esq., as sole referee, * to ascertain and report [the amount of wharfage which should be allowed to the plaintiffs for the breach of the covenant by the defendants, contained in the grant mentioned in the pleadings]. And for such purpose he is to ascertain [*etc., specifying the principles on which the account is to be taken*]. And he is to compute the interest on such amount, and state the same in his report.

And upon such report being confirmed according to the practice of this court either party may bring on the cause for final judgment.

2517. Order of reference to take an account between parties to a mortgage, in an action to redeem.

[*As in preceding form to the* *, *continuing*]: to take and state an account between the several parties to this action, in the manner and under the directions following, to-wit:

That he compute the amount due upon the bond and mortgage executed by the plaintiff to the defendant, Z...., mentioned in the complaint, from the .... day of ....., 19.., down to which time the interest appears to have been paid.

That he ascertain [from the deeds or otherwise] the consideration paid by the purchasers and defendants, X.... and Y...., from the said Z...., at the auction sale of the said premises made on the .... day of ....., 19.. [*proceeding to state the mode of apportioning the redemption money among them*].

That he open and state an account with each of such defendants, in which he is to allow such party his proportion of the mortgage money so ascertained as aforesaid, with in-

terest; and also all taxes and assessments paid by him or those under whom he claims, upon the lots now held by him; and also any sum paid for necessary repairs upon the same, and any amount expended for lasting improvements, with interest on such sums respectively; and that he state and charge such party with any rents and profits of such lots received by him, or those under whom he claims, or by any one on his or their behalf, or which could have been received without wilful default, with interest.

And upon the coming in and confirmation of the report, the action may be brought on for final determination.

2518. Order of reference for accounting in partnership cause.

[*As in Form 2516 to the *, continuing*]: to take and state an account of all dealings and transactions between the plaintiff and defendant, as partners, under the style of A.... B.... & Co.; and for the better taking and stating of which account the parties are to produce before the said referee, under oath, all books, deeds, papers, and writings in their cutody, or under their control, relating thereto; and are to be examined upon interrogatories or otherwise, as the said referee shall direct, who, in taking the said account, is to make all just allowances to the parties as between themselves; and what, on the balance of the said account, shall appear to be due from either party to the other, is to be paid as the said referee shall direct; and the referee is at liberty to state and report any special circumstances, as well as his reasons for allowing or disallowing any allowances which may be claimed.

And it is further ordered, that the question of costs, as well as all other questions, are reserved until the coming in of the report and hearing for further directions.

2519. Order of reference to determine priority among creditors.

[*As in Form 2516 to the *, continuing*]: to ascertain and report who are the creditors of the said firm of A.... B.... & Co., and the amounts due to said creditors respectively, and the order in which they are entitled to payment out of the assets of the said firm of A.... B.... & Co. [in conformity with the provisions of the statute of limited partnerships].

That any party to this action, or any person claiming to be a creditor of said firm, and presenting to the said referee *prima facie* evidence of his claim, shall have the right to contest any claim preferred by any other creditor, and that testimony may be taken before said referee on the part of the claimants and contestants. That the said referee report to this court the names of the creditors, and the amounts found by him to be due to each respectively, and the order in which they are entitled to payment; and that in case any of said claims be contested, the said referee do report the facts relative to the claim so contested, and the grounds of objection alleged by the contestant, and the decision of the said referee thereupon.

And it is further ordered, that on the coming in of the referee's report, any party to this action, or any creditor whose claim is allowed by the referee, may apply to this court for an order for the final distribution of the balance of the funds in the hands of the receiver herein, among the creditors of said firm as ascertained by said report, or by the order of the court thereupon.

And it is further ordered, that either party, or any creditor, may apply to this court, from time to time, for futher directions in the premises.

2520. Order of reference to take all testimony and report to the court.

[*Title.*] [*Caption as in Form 8.*]

This action coming on for trial, after hearing G.... H...., Esq., for the plaintiff and J.... K...., Esq., for the defendant,

ORDERED, that it be referred to L.... M...., Esq., as sole referee to take the testimony in said action and that he report the same to this court with all convenient speed.

2521. Plaintiff's account, to be presented on reference.

[*Title.*]

Statement of mutual accounts between the plaintiff and defendant as partners, under the name of A.... B.... & Co. [since last balance and settlement had between them on the .... day of ....., 19..]

[*Here state items, e. g., thus*]:

A.... B.... IN ACCOUNT WITH Y.... Z.... IN RESPECT TO SAID PARTNERSHIP TRANSACTIONS.

DR.		CONTRA.	CR.
19....		19....	
Jan. 15—To cash received at that date on partnership note of F..... P..... and not entered on firm books.	$.....	Jan. 1.—By balance due said A..... B..... on settlement of partnership accounts and transactions up to date, as appears by partnership books of account deposited with referee.....	$.....
May 5.—To one-half merchandise account charged to account of plaintiff, as appears by the firm books deposited with referee.....	$.....	Interest thereon to date....	$.....
		Feb. 3.—By cash, etc.	$.....

[*Venue.*]

A.... B...., the above-named plaintiff, being duly sworn, says that the foregoing account, and the said several accounts and entries embraced in the settlement of the .... day of ....., 19.., upon the partnership books herewith deposited with the referee in this action, including both debits and credits, are correct, according to the best of deponent's knowledge, information, and belief, and this deponent does not know of any error or omission in said account to the prejudice of his said co-partner, the defendant.

A.... B....

[*Jurat.*]

2522. Order that books and papers be deposited with referee before accounting.

[*Title.*] [*Caption as in Form 8.*]

On reading and filing the affidavit of A.... B...., the plaintiff [*or*, on the petition of C.... D...., *or*, on the certificate of the referee] herein, dated the .... day of ....., 19.., and on motion of M.... N...., for the plaintiff, and on hearing O.... P...., for the defendant [*or*, and on proof of due service of notice of this motion and no one appearing], in opposition.

ORDERED, that the defendant Y.... Z...., within [four] days after personal service hereof, on said defendant, or on his attorneys, produce before the said referee, under oath, all [*here specify the writings*] in his custody or power, relating to the matters in question; or, in default thereof, that, on the referee's certificate of such default, an attachment issue to

the sheriff of the county of ....., to take the said defendant into custody and bring him before this court to answer for the contempt.

2523. Oath of referee.[4]

[*Title.*]
[*Venue.*]

I [E.... F....], having been appointed referee in this action [to try the issues in this action] [*or*, for the purposes in said order mentioned], do solemnly swear [*or*, affirm] that I will faithfully discharge my duties as such referee to the best of my ability, so help me God [*or in case of affirming* and this I do under the pains and penalties of perjury].

E.... F....

[*Jurat.*]

2524. Oath of referee (Minn. Gen. Stats. 1913 sec. 5734).

[*Title.*]
[*Venue.*]

I, E.... F...., do swear that I will faithfully and justly perform all the duties of the office and trust which I now assume as the referee appointed in this action to hear and determine this action wherein N.... B.... is plaintiff and C.... D.... defendant and make a just and true report therein to the best of my ability, so help me God.

E.... F....

[*Jurat.*]

2525. Oath of referee (Iowa Code 1897 sec. 3745; Neb. R. S. 1913 sec. 7874).

[*Title.*]
[*Venue.*]

I, R.... F...., the referee [*or if more than one*, We, *naming them*, the referees appointed in this action], do hereby solemnly swear that I [*or* each for ourselves, that we] will well

[4] A referee should take an oath for the faithful performance of his duties whether specifically required by statute or not. It will, however, be presumed that he took the oath if nothing appears in the record to the contrary. Gilbank v. Stephenson, 31 Wis. 592. This form is doubtless sufficient in Wisconsin.

and faithfully hear and examine said cause, and make a just and true report therein according to the best of my [*or* our] understanding, so help me God.

R.... F....

[*Jurat.*]

2526. The same (N. Dak. Rev. Codes 1905 sec. 7052).

[*Commencement as in last preceding form*] will well and truly hear and determine the facts referred as aforesaid and true findings render according to the evidence, so help me God.

2527. The same (S. Dak. C. C. P. 1908 sec. 284).

[*Commencement as in last preceding form*] will well and truly try the issues in said action [*or where specific questions are referred*, will well and truly determine the questions referred] and make a just and true report according to the best of my [*or* our] knowledge and understanding, so help me God.

2528. Appointment of first meeting, by referee.

[*Title.*]

The undersigned referee[s] herein, hereby appoint the .... day of ..... next, at .... o'clock in the .... noon, at the office of ....., No. ...., ... street, in the city of ....., for the trial of this action.

[*Date.*] R.... F...., Referee.

2529. Notice of hearing or trial, by party.

[*Title.*]

Take notice, that this action will be brought to a hearing before R.... F...., referee herein, at his office No. ...., ... street, in the city of ....., on the .... day of ..... next, at .... o'clock in the .... noon.

[*Date.*]

A.... B....,

[*Address.*] Plaintiff's Attorney.

2530. Report of referee, general form.

To the ..... Court for ..... County:

Pursuant to the order of reference made in this action on the .... day of ....., 19.., I, the undersigned, as such ref-

eree, respectfully report that having taken the oath required by law as such referee, I appointed the .... day of ....., 19.., as the time, and my office in the city of ....., as the place, for the trial of said action, and duly gave each party notice of the time and place of such trial.

That on said day the trial was commenced and then continued from day to day until the .... day of ....., on which it concluded, A.... B...., Esq., appearing for the plaintiff and C.... D...., Esq., for the defendant.

[That upon the opening of the case the defendant moved to dismiss the action on the ground that the complaint stated no cause of action, which motion I denied and to which ruling the defendant excepted.]

[That, thereupon the plaintiff moved for leave to amend his complaint, which leave was granted, and the defendant excepted thereto and a copy of said amendment is hereto attached.]

The testimony taken before me is hereto annexed, marked exhibit A, and made part of this report, and the exceptions and rulings therein are stated in said evidence, as they were taken.

And I further report that after argument of counsel, being now fully advised in the premises, I hereby make and report the following findings of fact in said action:

I. [*Here state facts found separately as in a finding by the court.*]

And as conclusions of law I find as follows:

I. [*Here state legal conclusions separately.*]

And that the plaintiff is entitled to judgment as follows [*here state judgment which should follow findings.*]

[*Date.*]

Respectfully submitted,

[*Attach statement of fees.*] M.... N...., Referee.

2531. Report in partnership cause.

[*Commencement as in last preceding form.*]

I find, as Conclusions of Fact:

I. That from the .... day of ....., 19.., to the .... day of ..... [when this action was commenced], the parties hereto were partners in the business of ....., at .....

[under articles of agreement set forth in the complaint herein].

II. That the defendant in the month of ..... took exclusive possession of the partnership assets and books, and then, and ever since, prevented the plaintiff from having free access thereto, and obstructed his use and control thereof.

I find, as Conclusions of Law:

I. That the plaintiff is entitled to a judgment declaring said partnership dissolved as of the .... day of ....., 19..

II. That the plaintiff is entitled to an accounting with the defendant in respect to the partnership dealings, and the use made of the partnership property by the defendant.

III. That on such accounting the plaintiff is entitled to have allowed to him [*here set forth the principles on which the accounting should be taken*].

[*Date.*]

M.... N...., Referee.

2532. Referee's report on accounting in partnership cause.

[*Title.*]

To the ..... court of .....

Pursuant to an order of this court, in this action, dated the .... day of ....., 19..; I, the undersigned referee report:* That having been attended by the attorneys for the several parties who appeared in this action, I proceeded to a hearing of the matter so referred. I further report, that on such hearing, the books, deeds, papers, and vouchers of the said partnership having been produced before me, the defendant rendered his [*or*, both parties rendered their respective] accounts, which are hereto annexed, and marked Schedule A.

II. That I examined said defendant, and also X.... Y...., concerning the transactions aforesaid, and adjusted a mutual account between the plaintiff and defendant, making therein all just allowances, and striking a balance which shows what appears to be due from either party to the other, which said account is hereto annexed and marked Schedule B.

III. That said defendant owes to said partnership, at this date, the sum of ..... dollars, with interest from the

*... day of ....., 19.., at the rate of .... per cent. per annum, amounting to ..... dollars which sum I have allowed.

IV. That the balance shown by said Schedule B, after defendant has made good to said partnership said sum, belongs to plaintiff and defendant in equal shares [*or*, in the following proportions, *stating them*].

[*Date.*]

O.... P...., Referee.

2533. Referee's report as to priority of creditors.

[*As in preceding form, to the* *, *continuing*]:

That I have been attended upon such reference by counsel for the plaintiff and for the defendants, and for M.... N.... and O.... P...., creditors of said firm of Y.... Z.... & Co.

That upon being served with a copy of the said order, I caused notice to be published [twice a week, for three weeks, in two daily newspapers of the city of New York, one published in the morning and one published in the afternoon], requiring all persons having any claim against the said firm, to produce and prove the same before me at a place in said city, and by a time therein specified; copies of which notice, with affidavits of the publication thereof, are hereto annexed, marked Schedule No. 1 and Schedule No. 2.

That I also obtained from the defendant, W.... X...., a list of the outstanding creditors of the said firm, made up by him while acting as assignee thereof, and which he testified was correct, to the best of his knowledge, information, and belief; and I caused duplicates of the said notice to be served upon all of such creditors, either personally or by being left at their places of business, or when such creditors were a firm now dissolved, to be served as aforesaid upon one of the members of such creditor-firm.

II. I further report, that the creditors of the said firm of Y.... Z.... & Co., and the amounts at the date of this my report, found due to them, respectively, are as follows [*designating names and amounts*].

III. I further report, that of the said creditors, M.... N.... above mentioned, is entitled to be preferred to all the others to the extent of ..... dollars, being the amount

[*specifying nature of claim and grounds of preference*]. That except as to the said sum of ..... dollars, all the said creditors, including the said M.... N...., are entitled to be paid ratably and proportionably out of the assets of the firm of Y.... Z.... & Co., and that neither ought to be postponed to any other in whole or in part, except as aforesaid.

IV. I further report, that one and one only of the said claims is contested by either party, or by any creditor, namely, the said claim of O.... P....; that the facts relative to the said claim are as follows [*stating the facts, and continuing*]; and that I found the facts in respect thereto to be as above stated and decided, and do report that by virtue of the facts above stated, the said O.... P.... has a valid claim against the said Y.... Z.... & Co., for the amount above seventhly mentioned in the second article of this my report, being the sum of ..... dollars, with interest thereon from the said .... day of ....., 19..

2534. Notice of claim to surplus in foreclosure (Wis. circuit court rule XXV and sub. 4).

[*Title of the cause.*]

Take notice, that the undersigned is entitled to the surplus moneys, or a part thereof, arising on the sale made in this action, on the .... day of ....., instant [*here state the nature and extent of the claim,—e. g., thus*]: The claim of the undersigned is for ..... dollars, and interest thereon, from the .... day of ....., 19.., by virtue of a lien under a judgment against [*or*, mortgage given by] the defendant Y.... Z...., while the said Y.... Z.... was the owner of the equity of redemption in the mortgaged premises, and before the commencement of this action [*or*, by virtue of his being the owner of the equity of redemption in the mortgaged premises], which lien is next in priority after the mortgage of the plaintiff in this action.

[*Date.*]

[*Signature.*]

[*Address to clerk of court with whom it should be filed.*]

2535. Affidavit to move for reference of claim to surplus in foreclosure.

[*Title.*]

[*Venue.*]

W.... X.... [one of the defendants in this action], being duly sworn, says:

That this action was brought to foreclose a mortgage on real property; that judgment has been entered in said action, as this deponent is informed and believes, and that a sale has been made of the mortgaged premises under the direction of the court, and that the claim of the plaintiff in the action has been paid; and there remains a surplus of about ..... dollars over and above the money due on said mortgage and costs of this action, which surplus has been brought into this court subject to the order thereof.

That deponent has a claim on the said surplus moneys amounting to ..... dollars; which claim consists of a judgment obtained in this court, on the ..... day of ....., 19.., against Y.... Z.... [*or*, a mortgage made on, etc., by Y.... Z....], then the owner in fee of the mortgaged premises [*or*, which claim arises by virtue of the fact that he was the owner of the equity of redemption in the mortgaged premises].

W.... X....

[*Jurat.*]

2536. Notice of motion for reference to obtain surplus moneys on foreclosure sale.

[*Title.*]

TAKE NOTICE that upon the annexed affidavit of W.... X.... and upon the pleasings and proceedings on file in this action the undersigned will move the ..... court on the .... day of ....., 19.., at .... o'clock A. M. or as soon thereafter as counsel can be heard, that it be referred to R.... F...., Esq., of ....., to ascertain and report the amount due the said W.... X...., or to any other person, which is a lien upon such surplus moneys, and as to the priority of the several liens thereon, and for such other relief as may be just.

[*Date.*]

M.... N...,
Attorney for said W.... X....

[*Addressed to every party who has appeared or filed notice of claim.*]

2537. Order of reference of claims to surplus moneys.

Title.] [*Caption as in Form 8.*]

On reading and filing notice of claim, by W.... X.... to surplus moneys in this action, and on motion of M.... N.... for the said W.... X...., and O.... P.... having been heard for [*or*, and on reading and filing proof of due service of notice of this application on] all the parties who have appeared or who have served notice of claim of such moneys, in opposition:

ORDERED, that it be referred to R.... F...., Esq., of ....., as a referee, to ascertain and report the amount due the said W.... X...., or to any other person, which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon; and that the said referee report thereon with all convenient speed.

2538. Referee's report thereon.

[*As in Form 2532 to the *, continuing*]:

I caused all the parties who have appeared in this action, and all persons having filed notice of claim upon such surplus moneys, to be summoned to appear before me; as appears by the certificate of the clerk, showing what notices of claim have been filed, and by the summons and proof of service, which are annexed and marked schedule A. And that on the hearing, I was attended by M.... N.... for W.... X...., and by O.... P.... for the defendant Y.... Z....

The amount of such surplus moneys is ..... dollars, as appears by the certificate of the clerk of this court hereto annexed as schedule B.

[*Then set forth the claims, the evidence or facts proved, and any objections interposed, and then the conclusion of the referee, e. g., thus*]:

And I find the foregoing facts, and from the facts so found, I report that said W.... X...., under and by virtue of the sheriff's deed to him, is the owner of the equity of redemption of said premises, and as such owner, he is entitled to the

whole of said surplus moneys, and that there is no lien or claim thereon prior to the lien and claim of said W.... X....

[*Date.*]

R.... F...., Referee.

2539. Notice of motion for payment.

[*Title.*]

TAKE NOTICE that the referee's report as to the surplus moneys in this cause, with a copy whereof you have been served, will be presented to this court at a special term thereof, to be held at the court-house in ....., on the .... day of ..... next, at the opening of the court on that day or as soon thereafter as counsel can be heard, and a motion will then and there be made for an order [confirming said report, and] that the clerk of this court pay to the defendant, W.... X...., or his attorney, the whole [*or*, ... dollars] of the surplus moneys in this cause deposited with him, and for such further or other relief as may be just, with costs.

[*Date.*]

M.... N....

[*To all parties and claimants to the fund who have appeared.*]

2540. Order distributing surplus moneys on foreclosure.

[*Title.* [*Caption as in Form 8.*]

[*Recite reference and report substantially as in Form 2546 infra, and continuing*]:

IT IS ORDERED that said report be, and the same is, hereby in all things confirmed, and that the clerk of this court, upon the filing of this order, be and he is hereby directed to pay, out of the surplus moneys remaining in his hands to the credit of this action, to the persons named below the sums set opposite their respective names and in the order named.

I. To W.... X...., the sum of ..... dollars [*follow with others if any*].

By the Court:

O..... P....., Judge.

2541. Notice of filing report of referee.[5]

[*Title.*]

SIR: Please take notice that on the .... day of ....., 19.., M.... N...., the referee appointed to try the issues herein, filed in the office of the clerk of said court his report, and that a copy of his findings of fact and conclusions of law as contained in said report are hereto annexed and herewith served on you.

[*Date.*]

O.... P....,
Attorney for ....

To [*Address*],
Attorney for.... ....

2542. Exceptions to report.[6]

[*Title.*]

And now comes the plaintiff [*or* defendant] and excepts to the report of M.... N...., referee in said action, dated ....., 19.., as follows:

I. He excepts to the first finding of fact in said report contained [*or if the exception be to a part of the finding*] to that part of the first finding of fact which reads as follows [*insert part excepted to*].

II. [*Proceed in same way as to other findings excepted to*].

III. [*If the exception be based upon a failure to find as to any specific fact*]: He excepts to the said report for the reason that the said referee failed to find [*here state fact omitted*].

[*Date.*]

O.... P....,
Plaintiff's [*or*, Defendant's] Attorney.

[5] Wis. Stats. 1913 sec. 2871; N. Dak. Rev. Code 1905 sec. 7057.

[6] Exceptions must be filed to the finding of the referee in order to entitle the party objecting to a review of the findings by the court. Wis. Stats. 1913 sec. 2871; Cal. C. C. P. 1906 sec. 644, 645; Colo. Code Ann. 1911 sec. 231; Idaho Rev. Codes 1908 sec. 4421; Iowa Ann. 1897 sec. 3740, 3742; Kans. Gen. Stats. 1909 sec. 5894; Mont. Rev. Codes 1907 sec. 6781, 6782; Minn. Gen. Stats. 1913 sec. 7823; Mo. R. S. 1909 sec. 2012; Neb. R. S. 1913 sec. 7892; State v. Standard Oil Co. 63 Neb. 95; 88 N. W. 175; N. Dak. Rev. Codes 1905 sec. 7057; S. Dak. C. C. P. 1908 sec. 288; Okla. Comp. Laws 1909 sec. 5812, 5814; Oregon Laws 1910 sec. 166; Utah Comp. Laws 1907 sec. 3177; Wash. Rem. and Bal. Code 1910 sec. 375; Wyo. Comp. Stats. 1910 sec. 4523.

2543. Motion to confirm report of referee and for judgment.

[*The object of the motion may be stated thus after formal parts*]: that the said report and the findings of facts and conclusions of law therein be confirmed by the court and that judgment for the plaintiff [*or* defendant] be rendered according to the recommendations of said report.

[*Date.*]

O.... P...., Plaintiff's [*or*, Defendant's] Attorney.

2544. Motion for further report.

[*The object of the motion may be stated thus after formal parts*]: that M.... N...., the referee in this action, be required to make a further report herein stating [his findings of fact and conclusions of law separately, *or*, his finding upon the question *here briefly state question*].

2545. Motion to set aside report and for a new trial.[7]

[*Title.*]

SIR: Please take notice that upon the report of O.... P...., Esq., the referee herein, heretofore filed and upon the pleadings and papers on file in this action [and the affidavits of E..... F.... and G.... H...., of which copies are herewith served on you], the plaintiff [*or*, defendant] will move the court, on the .... day of ....., 19.., at the court house in the city of ....., in said county, at the opening of the court on that day or as soon thereafter as counsel can be heard, for an order vacating and setting aside the said report of the referee and directing a new trial of the issues in this action.

[*Date.*]

M..... N...., ..., Attorney.

To [*Address*], ..., Attorney.

[7] Wis. Stats. 1913 sec. 2865; Ariz. R. S. 1913 sec. 667; Cal. C. C. P. 1906 sec. 644, 645; Colo. Code Ann. 1911 sec. 233; Idaho Rev. Codes 1908 sec. 4420, 4421; Iowa Ann. Code 1897 sec. 3742; Kans. Gen. Stats. 1909 sec. 5894; Mont Rev. Codes 1907 sec. 6782; Minn. Gen. Stats. 1913 sec. 7823; Mo. R. S. 1909 sec. 2013; Neb. R. S. 1913 sec. 1284; N. Dak. Rev. Codes 1905 sec. 7057; S. Dak. C. C. P. 1908 sec.

2546. Order confirming, setting aside, or amending referee's report.

[*Title.*]

This cause coming on to be heard on the .... day of ....., 19.., upon the motion of A.... B...., the plaintiff [*or*, defendant] to [confirm the report of O.... P...., Esq., referee herein] [*or*, to alter the report of O.... P...., referee herein], [*or*, to modify the report of O.... P...., referee herein], *or*, to set aside report of O.... P...., referee herein]; and said motion having been heard upon the pleadings, the evidence taken and the findings of said referee and the [*here specify any other papers that may have been used upon the motion*] and after hearing G.... H...., Esq., for the ....., for the motion, and L.... M.... in opposition, and being advised in the premises:

ORDERED, that the said report of the referee herein be and the same is hereby confirmed, and that judgment be entered in accordance therewith, to wit [*here specify the judgment to be entered*] *or:*

ORDERED, that the said report be altered and modified in the following respects, to-wit [*here specify the alteration or modification*], and that judgment be entered upon the same as so altered and modified, to-wit [*here specify the substance of the judgment ordered*], *or:*

ORDERED, that the said report be and the same is hereby set aside [and that a trial by the court of the several issues so referred be had], *or:*

ORDERED, that said report be referred back to said referee who is directed to amend the same in the following respects, namely [*here specify the nature of the amendments directed*].

By the Court:

J.... K...., Judge.

290; Okla. Comp. Laws 1909 sec. 5814; Oregon Laws 1910 sec. 166; Utah Comp. Laws 1907 sec. 3177; Wash. Rem. and Bal. Code 1910 sec. 376; Wyo. Comp. Stats. 1910 sec. 4523.

CHAPTER CXXXIX.

TRIALS BY THE COURT.

2547. Written stipulation waiving jury trial.

2548. Findings by the court, general form.

2549. Findings in an action on a promissory note.

2550. The same, in an action upon an innkeeper's liability.

2551. The same, in divorce action.

2552. Request for findings.

2553. Exceptions to the findings.

2554. Notice of filing of the decision.

2547. Written stipulation waiving jury trial.[1]

[*Title.*]

It is hereby stipulated by the parties that trial by jury be waived and that the same be tried by the court [at the .... term of the ..... court for ..... county, notice of trial being hereby waived].

[*Date.*]

G.... H...., Plaintiff's Attorney.
J.... K...., Defendant's Attorney.

2548. Finding by the court, general form.[2]

[*Title.*]

This action coming on for trial at the .... term of said court and having been tried before the court [a jury trial

[1] As a general rule trial by jury may be waived also by failing to appear in the action and by oral consent of the parties in open court entered on the minutes.

[2] Upon the trial of any issue by the court the decision must be in writing, stating the facts and conclusions of law separately. Wis. Stats. 1913 sec. 2863; Ariz. R. S. 1913 sec. 528; Ark. Dig of Stats. 1904 sec. 6213; Cal. C. C. P. 1906 sec. 632, 633; Colo. Code Ann. 1911 sec. 290; Idaho Rev. Codes 1908 sec. 4406, 4407; Mont. Rev. Codes 1907 sec. 6763, 6764; Minn. Gen. Stats. 1913 sec. 7815; N. Dak. Rev. Codes 1905 sec. 7039, 7040; S. Dak. C. C. P. 1908 sec. 276, 277; Oregon Laws 1910 sec. 158; Utah Comp. Laws 1907, sec. 3168, 3169; Wash. Rem. and Bal. Code 1910 sec. 367. In Iowa findings of fact are only necessary in actions at law, and then only when requested by one of the parties. Iowa Ann. Code 1897 sec. 3654. In some of the states a general finding for plaintiff or defendant is sufficient unless one of the parties requests separate findings: Kans. Gen. Stats. 1909 sec. 5891; Mo. R. S.

having been waived] on the .... day of ....., 19.., G.... H...., Esq., appearing for the plaintiff, and J.... K...., Esq., for the defendant; and after hearing the allegations and proofs of the parties, the arguments of counsel, and being advised in the premises, I hereby make and file the following findings of fact and conclusions of law constituting my decision in said action:

Findings of Fact.

I. That [here state the facts found separately and concisely].

II. That, etc.

Conclusions of Law.

I. That [*here specify the same*].

Let judgment be entered accordingly.

[*Date.*]

By the Court:

O.... P...., Circuit Judge.

2549. Findings in an action on a promissory note.[3]

[*Commencement as in last preceding form.*]

Findings of Fact.

I. That at the time of making the note hereinafter mentioned, the plaintiff, and one C.... D...., were partners in busines, under the firm-name of A.... B.... & Co.

II. That on the .... day of ....., 19.., at ....., the defendant made his promissory note in writing, dated on that day, and thereby promised to pay to the plaintiff and C.... D...., under said firm-name, ... dollars, in .... months after said date.

III. That no part thereof has been paid.

1909 sec. 1972; Neb. R. S. 1913 sec. 7865; Okla. Comp. Laws 1909 sec. 5809; Tex. Civ. Stats. Ann. 1913 art. 1989; Wyo. Comp. Stats. 1910 sec. 4515. In Wisconsin the general finding stating that all the allegations of the complaint are true is not considered a finding of any specific fact. Burke v. Sidra Bay Co. 116 Wis. 137; 92 N. W. 568; McKenzie v. Haines 123 Wis. 557; 102 N. W. 33.

[3] This and the following forms are merely suggestive. The *desideratum* in a finding of fact is that each ultimate material litigated fact be stated separately and concisely and that the conclusions of law necessary to support the judgment be stated in the same way.

IV. That on the .... day of ....., 19.., at ....., said C.... D.... died leaving the plaintiff sole surviving partner of said firm.

Conclusions of Law.

I. That the cause of action against the defendant survived to the plaintiff on the death of C.... D....

II. That the defendant is indebted to the plaintiff on said note for ..... dollars.

Let judgment be entered for the plaintiff in the sum of ..... dollars, with costs.

M.... N...., Judge.

2550. The same, in an action upon an inn-keeper's liability.

[*Commencement as in preceding form.*]

Findings of Fact.

I. That on the .... day of ....., 19.., the defendant was a common inn-keeper at the town of ....., in this state.

II. That on said day the defendant received and entertained the plaintiff as a guest at his inn, for hire.

III. That the inn of the defendant was upon the seashore, and in connection with it the defendant maintained bathing-houses for the safekeeping of the clothing, wardrobe, and such money and jewelry of his guests as are usually carried upon the person of guests and patrons of his inn and bathing-house.

IV. That while the plaintiff was then and there his guest, the defendant undertook for compensation paid him by the plaintiff, to keep safely in one of his said bathing-houses, the clothing and such articles of jewelry and valuables as the plaintiff then had upon his person, while the plaintiff should bathe.

V. That plaintiff thereupon put into the said bathing-house his clothing, his pocket-book containing money, and such other property as is usually carried upon the person, of the value of ..... dollars, and left the same in the possession and charge of the defendant.

VI. That while the plaintiff was there bathing, his pocket-book and money were, by the negligent and dishonest management of the defendant and his servants, lost and stolen.

VII. That the said inn was upon the seashore; and that facilities for bathing according to the custom of the neighborhood, and as the defendant then well knew, were a part of the accommodations necessary to be afforded by the inn-keepers in that vicinity.

VII. That the defendant did not provide or maintain a safe for the reception of the money, valuables or jewelry of his guests.

Conclusions of Law.

I. That defendant is liable for the money so lost in his capacity of inn-keeper.

II. That the defendant is liable for the money so lost, by reason of his negligence and misconduct as bailee for hire of said property.

III. That the defendant is responsible for the negligence and misconduct of his servants in the course of their ordinary employment.

IV. That the money so lost by plaintiff was such a sum as he might reasonably carry on his person.

V. That plaintiff is not entitled to recover his expenses of advertising his loss, or in employing police officers to recover his said pocket-book.

Judgment is ordered for the plaintiff in the sum of ..... dollars, with costs.

M.... N...., Judge.

2551. The same in divorce action.

[*Commencement as in preceding form.*]

Findings of Fact.

I. That the parties were married [*state when and where*].

II. That on the .... day of ....., 19.., the defendant wilfully deserted the plaintiff, and remained away from her for the term of one year and more next preceding the commencement of this action and wholly neglected during that time to provide for her support, or to live and cohabit with her.

III. That the defendant, is the owner of property, as follows: [*here specify the same in general terms and the value*]; that his faculties are as follows: [*here specify his abilities to earn money, and his income, as shown by the proofs*].

IV. That the children of the parties are two in number namely [*name children and give ages*]; that the plaintiff is the fit and proper person to have the care and custody of them and supervision of their education, and the father is not a fit person.

And I find as

Conclusions of Law.

I. That the plaintiff is entitled to divorce from the bonds of matrimony, as prayed in the complaint.

II. That she is entitled to an allowance, as alimony, out of the estate of the defendant, of the sum of ..... dollars; to be paid to her in ..... installments [*here specify dates and place of payment*]; and that such payment be charged as a lien upon the following described real estate of the defendant, which he now has, to-wit [*describe the specific real estate*]; and that upon neglect or refusal to pay such allowance as suit money, the plaintiff may apply to the court to enforce the same by execution.

III. That, in addition to the suit money heretofore allowed, the plaintiff should recover her taxable costs in this action.

IV. That the plaintiff be awarded the care and custody of the minor children [*name them*], and that the defendant be adjudged to pay an allowance of ..... dollars [*here specify the times and manner of payment*], and that the said sum be a charge upon the following described real estate of the defendant, to-wit: [*describe same*].

Or, That the defendant give security for such payment, by executing a bond with two sureties, to be approved by the clerk of the court.

[*Or, when the court decides that a division of the property be had, the finding may direct this in place of paragraph II above*]:

II. That the property of the husband, both real and personal, be finally divided and distributed between the parties, as follows: The following described real estate of the defendant, to-wit: [*describe it*], shall be allowed to the plaintiff, and the judgment shall divest him of the title and

transfer the same to her. The following described personal property shall also be allowed to the plaintiff and the title transferred to her by the judgment, to-wit: [*describe it*].

Let judgment be entered accordingly.

M.... N....,
Judge.

2552. Request for findings.

[*Title.*]

Now comes the plaintiff [*or*, defendant] herein and hereby requests the court to make the following findings of facts and conclusions of law in this action.

[*Here set forth the separate findings desired, in the same manner as in a finding by the court.*]

2553. Exceptions to the findings.

[*Title.*]

Now comes the plaintiff [*or*, defendant] and excepts to the findings of the court heretofore made and filed in this action as follows:

I. He excepts to the first finding of fact therein contained [*or*, to that part of the first finding of fact therein contained which reads as follows: *state the part excepted to*].

II. He excepts to [*state second separate fact excepted to, and so on*].

III. He excepts to said decision because it fails to find [*here state any fact omitted which should have been found*].

IV. He excepts to the refusal of the court to find the following fact as requested [*here set forth any finding requested and refused*].

[*Date.*]

G.... H....,
Attorney for .....

2554. Notice of filing of the decision.

[*Title.*]

Take notice, that the within [*or*, the foregoing] is a copy of the decision of Mr. Justice M.... N.... in this action,

tried before him without a jury, and of his findings of fact and conclusions of law herein, and that the same was filed in the office of the clerk of the ..... court of ..... county, on the .... day of ....., 19..

G.... H....,
..... Attorney.

To J.... K....,
..... Attorney.

CHAPTER CXL.

NEW TRIALS AND BILLS OF EXCEPTIONS.

2555. Motion for new trial, on the minutes of the judge.
2556. Notice of motion for new trial on statement of the case or bill of exceptions.
2557. Alternative motions to set aside answers of special verdict and for judgment, or in event of refusal to grant new trial.
2558. Motion for new trial on ground of newly discovered evidence.
2559. Affidavit for new trial showing newly discovered evidence.
2560. Corroborating affidavit.
2561. Affidavit to move for a new trial on the ground of surprise.
2562. Affidavit for new trial on the ground of surprise.
2563. The same, another form.
2564. Corroborating affidavit.
2565. Affidavit for new trial because of misconduct of a juror.
2566. Affidavit for new trial for misconduct of the jury.
2567. Affidavit for new trial on ground of improper communication by a party to the members of the jury.
2568. Order granting new trial before judgment on terms.
2569. The same, without terms.
2570. Same, after judgment entered.
2571. Order for new trial for excessive damages.
2572. Proposed bill of exceptions, jury trial.
2573. Notice served with proposed bill of exceptions.
2574. Reporter's certificate. (Wisconsin).
2575. Proposed amendments to bill of exceptions.
2576. Notice of settlement of bill of exceptions.
2577. Certificate to bill of exceptions or statement of facts (Washington).

2555. Motion for new trial, on the minutes of the judge.[1]

[*Title.*]

And now comes the defendant above named at the same term at which the said action was tried and moves, upon the

[1] Wis. Stats. 1913 sec. 2878. In Iowa the motion must be made within three days after the verdict or decision is rendered (Iowa Ann. Code 1897 sec. 3755, 3756), except when made on the ground of newly discovered evidence. In North Dakota the particular errors of law relied on, or the particular in which the evidence is insufficient to sustain the verdict, must be set forth in the motion (N. Dak. Rev. Codes 1905 sec. 7064, 7065); the same rule exists in South Dakota (S. Dak. C. C. P. 1908 sec. 303 subd. 4). In Nebraska the application must be

minues of the judge, to set aside the verdict herein and for a new trial of said action upon the following grounds:

I. Because the court erred in overruling the defendant's objection to the reception of any evidence under the complaint.

II. Because the court erred in admitting evidence against the objection of the defendant.

III. Because the court erred in refusing to receive evidence offered by the defendant upon the trial.

IV. Because the court erred in instructing the jury in the particulars to which the defendant has filed written exceptions.

V. Because the court erred in refusing to instruct the jury as requested by the defendant in writing.

VI. Because the verdict is contrary to law.

VII. Because the verdict is contrary to the evidence.

VIII. Because the damages are excessive.

[*Date.*]

J.... K....,
Defendant's Attorney

2556. Notice of motion for new trial on statement of the case or bill of exceptions.

[*Title.*]

TAKE NOTICE, that the above named defendant intends to and will move the court to set aside the verdict of the jury herein and grant a new trial of this action on the following grounds, to-wit:

I. Insufficiency of the evidence to justify the verdict of the jury [*state in what particular*].

II. That said verdict is against the law.

within three days after verdict, but the grounds of the motion need only be stated in the language of the statute (Neb. R. S. 1913 sec. 7883, 7885). In the balance of the states covered by this work, the following statutes govern the subject: Ariz. R. S. 1913 sec. 585; Ark. Dig. of Stats. 1904 sec. 6218-6220; Cal. C. C. P. 1906 sec. 657-659; Colo. Code Ann. 1911 sec. 237; Idaho Rev. Codes 1908 sec. 4440; Kans. Gen. Stats. 1909 sec. 5900; Mont. Rev. Codes 1907 sec. 9351; Minn. Gen. Stats. 1913 sec. 7829; Mo. R. S. 1909 sec. 2025; Okla. Comp. Laws 1909 sec. 5829; Oregon Laws 1910 sec. 175; Tex. Civ. Stats. Ann. 1913 art. 2019 *et seq.;* Utah Comp. Laws 1907 sec. 3293; Wash. Rem. and Bal. Code 1910 sec. 400; Wyo. Comp. Stats. 1910 sec. 4604.

III. Errors in law occurring at the trial and excepted to by the defendant as follows, to-wit: [*specify the errors*].

The said motion will be made upon a statement of the case [*or*, a bill of exceptions] hereafter to be settled and filed.

[*Date.*]

E.... F....,
Defendant's Attorney.

To said plaintiff and to L.... M...., Esq., his attorney.

2557. Alternative motions to set aside answers, of special verdict.

[*Title.*]

NOW, at said term and in open court at the time said verdict is returned, the plaintiff moves said court, upon said verdict, and upon the records and papers on file, proceedings had in the above entitled cause, including the exceptions taken by the plaintiff upon said trial, and the minutes of the judge thereof, as follows:

First Motion: Plaintiff moves for judgment in favor of the plaintiff upon said special verdict of the jury rendered in said action.

Second Motion: If said "First Motion" be denied, plaintiff moves for judgment in favor of the plaintiff, notwithstanding said special verdict of the jury rendered in this action.

Third Motion: If said "First" and "Second" motions be denied, plaintiff moves for an order changing the answer to the second question in the special verdict from "Yes" to "No," and for judgment in favor of the plaintiff upon said special verdict, when so amended, and upon the uncontradicted evidence.

Fourth Motion: If said "First," "Second" and "Third" motions be denied, plaintiff moves for an order changing the answer to the third question in said special verdict from "No" to "Yes," and for judgment in favor of the plaintiff upon said special verdict, when so amended, and upon the uncontradicted evidence.

Fifth Motion: If said "First," "Second," "Third" and "Fourth" motions be denied, plaintiff moves for an order changing the answer to the fourth question of said special verdict from "Yes" to "No" and for judgment in favor of the plaintiff upon said special verdict, when so amended, and upon the uncontradicted evidence.

Sixth Motion: If the "First," "Second," "Third," "Fourth" and "Fifth" motions herein be denied, plaintiff moves for an order changing the answer to the sixth question of said special verdict from "No" to "Yes," and for judgment in favor of the plaintiff upon said special verdict, when so amended, and upon the uncontradicted evidence.

Seventh Motion: If said "First," "Second," "Third," "Fourth," "Fifth" and "Sixth" motions herein be denied, plaintiff moves for an order changing the answer to the second question in said special verdict from "Yes" to "No," and the answer to the third question in said special verdict from "No" to "Yes," and for judgment in favor of the plaintiff upon said special verdict, when so amended, and upon the uncontradicted evidence.

Eighth Motion: If said "First," "Second," "Third," "Fourth," "Fifth," "Sixth" and "Seventh" motions herein be denied, plaintiff moves for an order changing the answer to the second question in said special verdict from "Yes" to "No," and the answer to the third question in said special verdict from "No" to "Yes," and the answer to the fourth question in said special verdict from "Yes" to "No," and for judgment in favor of the plaintiff upon said special verdict, when so amended, and upon the uncontradicted evidence.

Ninth Motion: If said "First," "Second," "Third," "Fourth," "Fifth," "Sixth," "Seventh" and "Eighth" motions herein be denied, plaintiff moves for an order changing the answer to the second question in said special verdict from "Yes" to "No," and the answer to the third question in said special verdict from "No" to "Yes," and the answer to the fourth question in said special verdict from "Yes" to "No," and the answer to the sixth question in said special verdict from "No" to "Yes," and for judgment in favor of the plaintiff upon said special verdict, when so amended, and upon the uncontradicted evidence.

Tenth Motion: If all of the foregoing motions be denied the plaintiff moves to set aside the verdict herein and for a new trial upon the following grounds, viz.: [*State grounds as in the preceding forms in this chapter*].

[*Dated.*]

L.... M....,
Plaintiff's Attorney.

2558. Motion for new trial on ground of newly discovered evidence.

[*Title.*]

Gentlemen: Take notice that upon the affidavits of L.... M.... and N.... O...., copies of which are herewith served upon you, and upon the pleadings and proceedings on file in said action [and upon the bill of exceptions heretofore settled in said action] the undersigned will on the .... day of ....., 19.., at .... o'clock, A. M., of that day at the court house in ....., move the court for an order setting aside the verdict in this action [*and the judgment entered therein*] and for a new trial herein upon the newly discovered evidence set forth in said affidavit.

Dated ....., 19.. R.... S....,
Attorney for .....

[*Address.*]

2559. Affidavit for new trial showing newly discovered evidence.[2]

C.... D.... being only sworn says that he is the defendant in the above entitled action.

That this action was tried on the .... day of ....., 19.., at [..... court], held in and for the county of ....., at ....., in said county.

That said trial resulted in a verdict for the plaintiff for ..... dollars.

That since the said trial, and on the .... day of ....., 19.., deponent has discovered for the first time that he could have proved by one J..... K...., who resides at ....., the following facts: that at the time of the representations testified to by L.... M...., upon the trial of this action, he was present; that the representations actually made by the defendant's agent at that interview were [*here set forth declarations made*]; that the said O.... P.... did not say

[2] Upon such an application it must appear that the evidence is (1) material, (2) not merely impeaching, (3) not cumulative, (4) that it was not known at the time of the former trial and (5) that reasonable diligence was used in preparing for such former trial. The motion must also be made promptly on discovery of the new evidence and (if possible) the affidavit of the new witness should accompany the application showing what he will testify to.

that [*here set forth declaration testified to by L.... M....*] or anything to that effect.

That before said trial the affiant used due diligence to obtain all the testimony necessary to support the issue on his part; but upon and after diligent inquiry was unable to learn and did not know that said J.... K.... was a material witness or knew anything of said transaction or to obtain the evidence which he is informed and believes he can prove by said witness.

That he was unable to produce any witness to the facts aforesaid on the former trial; that he made diligent search and inquiry for a witness and evidence to prove the said facts, but could find or learn of no one by whom said facts could be proved.

C.... D....

[*Jurat.*]

2560. Corroborating affidavit.

[*Title.*]
[*Venue.*]

J.... K....., being duly sworn, says:

That he is, and was at the time of the conversation between L.... M.... and the defendant's agent, O.... P...., a clerk in the store of the defendant.

That at the said conversation so referred to the said O.... P.... made the representations set forth in the foregoing affidavit, and no others.

That deponent did not communicate the facts aforesaid to the defendant before the verdict in this action because [*here set forth reasons, as for instance,* deponent did not know that any action had been commenced or was pending between the parties until after said verdict was rendered].

J.... K....

[*Jurat.*]

2561. Affidavit to move for a new trial on the ground of surprise.[3]

[*Title.*]
[*Venue.*]

Q.... R...., being duly sworn, says that he is the attorney for the defendant herein.

That this action was brought to recover possession of certain real property, to-wit, a farm in the town of ....., in this state.

That from the commencement of this action until about [ten] days prior to the trial hereof, the attorney for the plaintiff had in his possession a certain deed, made and executed by the father of the plaintiff, now deceased, conveying said real property in fee to one J.... K....

That plaintiff claims title to said real property by descent from his said father, and in no other way.

That deponent gave plaintiff's attorney reasonable notice to produce said deed on the trial, and further duly and seasonably subpoenaed the plaintiff's attorney to attend the trial, and bring with him the said deed.

That prior to the service of said notice and subpoena, the plaintiff's attorney delivered said deed to the plaintiff, who thereupon deposited the same with L.... M...., the counsel of plaintiff, residing in .....

That at the trial of this action, deponent learned for the first time that the said plaintiff's attorney had parted with said deed.

That up to the time he was put upon the stand, the plaintiff's attorney entirely concealed from deponent the fact that said deed was out of his possession.

That deponent was taken entirely by surprise by the failure of the plaintiff's attorney to produce said deed.

That on a new trial deponent can, as he believes, obtain the production of said deed, or if not, can prove the contents thereof by the testimony of J.... K....

Q..... R....

[*Jurat.*]

2562. Affidavit for new trial on the ground of surprise.[4]

[*Title.*]

[*Venue.*]

L.... M...., being duly sworn, says that he is the attorney for the defendant in this case and has had sole man-

[3] This motion should be made with promptness. It is a matter much within the discretion of the court and the facts should be established by corroborating affidavits if possible.

[4] Upon the grounds set forth in this affidavit a new trial was granted in Stoppelfeldt v. Ry. Co., 29 Wis. 688.

agement thereof from its commencement and is the only person familiar with the matters in controversy; that issue was joined in said action on the .... day of ....., 19.., and that the same was upon the calendar for trial at the .... term, 19.., of said court.

That on the .... day of ....., 19.., the affiant was unexpectedly called to ..... on professional business of great importance, and expected to be detained there but two days; but that he was compelled by said business to remain there until the .... day of ....., 19.., on which day he was informed by O.... P.... that the said court was about to adjourn *sine die*, and that the attorneys for the plaintiff would not consent to a postponement of the trial.

That thereupon, on the .... day of ....., 19.., by the first train the affiant hastened home but was unable to reach ..... until the .... day of ....., 19.., when he learned that the case had been brought on for trial in his absence, and the damages assessed, and verdict rendered, as now of record.

That upon the affiant's knowledge of the facts in the case and the testimony which the defendant has, and from consultation with the witnesses for the defendant, this affiant is of opinion that upon a retrial, the defendant will be able to establish his defense set forth in his answer.

L.... M....

[*Jurat.*]

[*Attach affidavit of merits, as follows*]:

[*Venue.*]

C.... D.... [defendant], being first duly sworn, says that he is the defendant in the above entitled action; that issue was joined therein on the ..... day of ....., 19.., and that this defendant has a valid defense in whole in said action [*or* in part, *specifying which part*].

C.... D....

[*Jurat.*]

2563. The same, another form.[5]

[*Title.*]

[*Venue.*]

L.... M...., being duly sworn, says that he is the defendant in this action. That the same was brought by plain-

tiff to recover [*here state plaintiff's alleged cause of action*] and that issue was joined therein ....., 19.., by the service of defendant's answer, in which the defendant pleaded a general denial to the complaint but did not set forth affirmatively the defense of payment, although as matter of fact said plaintiff's claim had been fully paid and discharged prior to the commencement of this action.

That said action was duly placed upon the calendar at the .... term of the ..... court but was not then tried but continued to the present term, and that a conversation was then held by counsel in the presence of the Hon. J.... K...., judge of said court, in which the question of the necessity of amending said answer so as to affirmatively show payment was discussed, and that said judge took part in said conversation; that the said conversation was to the effect that such amendment was unnecessary, and that the defendant was thereby misled as to the necessity of amending his answer, setting up said payment as a defense and led to believe that it could be shown in the proofs that such payment had been made; and being so misled, said defendant and his counsel deemed it unnecessary to plead the defense by amendment or to apply for leave to so amend.

L.... M....

[*Jurat.*]

[*Attach affidavit of merits as in Form 2562.*]

2564. Corroborating affidavit.

[*Title.*]

[*Venue.*]

E.... F...., being duly sworn, says that he is the attorney for the defendant in this action; that he has read the affidavit of L.... M.... hereto attached, and was present at the conversation therein referred to, and that the purport of said conversation is truly set forth in said affidavit. That deponent was misled by said conversation into the belief that the answer was sufficient to authorize the proof of payment as a defense, and that deponent relying thereon

[5] In the case of State ex rel. v. Hoeflinger, 33 Wis. 594, a new trial was granted on substantially the grounds set forth in this and the following affidavit and the order was affirmed by the supreme court.

proceeded to trial of said case without amending said answer and was completely surprised by objection to such proof made at the trial by the plaintiff.

E.... F....

[*Jurat.*]

2565. Affidavit for new trial because of misconduct of a juror.

[*Title.*]

[*Venue*]

J.... K...., being duly sworn, says that on the .... day of ....., 19.., the second day of the trial of this action, on the steps of the court house in the city of ....., he heard a conversation between one L.... M.... and R.... S...., one of the jurors before whom said action was then on trial.

II. That the said L.... M.... then and there told said juror that he was acquainted with the witnesses in this case, and had been acquainted; that they would swear to anything for a dollar.

III. That the said L.... M.... applied these remarks to the witnesses for the [defendant] only; that said L.... M.... spoke of U.... V...., one of the defendant's witnesses, in particular, as a bad character.

IV. That the said L.... M.... then and there stated to said juror that W.... X...., the principal witness for the plaintiff, was a very respectable citizen; that he had never heard anything against him.

V. That the said L.... M.... and the said juror were and are old acquaintances and friends.

VI. That on the next day, and while the trial was still proceeding at the same place, the said L.... M.... in the hearing of deponent, renewed the said conversation, and intimated that in his opinion the defendant was endeavoring to establish his case by false swearing.

J.... K....

[*Jurat.*]

2566. Affidavit for new trial for misconduct of the jury.

[*Title.*]

[*Venue.*]

J.... K...., being first duly sworn, says that he is one of the defendants in the above entitled action.

That the jury, in finding their verdict in this action, as the affiant is informed and believes, agreed that they should each mark the sum of damages he was in favor of assessing and that the sum of such marking divided by the number of jurors should be the amount assessed; and that upon such agreement previously made they so marked, added the result, divided the same by twelve, thereby arriving at the sum assessed as damages.

That four members of the jury, to-wit [*name them*], went, during recess in the trial, and viewed the premises where the alleged defect existed, by which the injury was received.

That the said jury, without leave of the court or the knowledge or consent of defendant's counsel, obtained possession of certain maps of the premises involved in the issue, and certain papers and letters, to-wit [*specify what*], which were not used in evidence, and in their deliberations in the jury room examined and read the same.

J.... K....

[*Jurat.*]

[*There should be added the affidavit of some person with personal knowledge of the facts, such as the officer in charge of the jury, if possible.*]

2567. Affidavit for new trial on ground of improper communication by a party to the members of the jury.[6]

[*Title.*]

[*Venue.*]

J.... K...., being duly sworn, says that on the morning of the second day of the trial of this cause, and after the plaintiff had rested his case, but before the opening of the court, three of the jurors who were empaneled to try the cause were in the bar-room of a public house in the village of ....., together with a number of other persons there assembled.

That while said jurors were there, the plaintiff addressed them, and said in their presence and hearing, that the de-

[6] The affidavit of a juror will not be received to show misconduct on the part of himself or other jurors, but may be received to show misconduct on the part of others by which the verdict may have been influenced.

fendants were a cut-throat corporation; that they had swindled the public; that they had defrauded him, the plaintiff; that he, plaintiff, had paid them thousands of dollars; that he delivered the fruit in controversy on said trial to the defendants at their dock to be carried on their boats, and that they refused to carry the same, and went off without it; and in consequence the fruit rotted or spoiled on his, plaintiff's hands, and he lost several hundred dollars; and that defendants ought to stand it or be compelled to suffer the loss.

That thereupon the constable in attendance upon the court remarked to the plaintiff in the presence and hearing of the jurymen, that the persons he was addressing were jurymen, and asked plaintiff if he did not know it.

That plaintiff immediately replied that he knew what he was about, and requested the constable to mind his own business, and that what he had been saying to the jurors about his suit was true; and he, plaintiff, afterwards continued addressing the jurors in substance as before, detailing as he, plaintiff insisted, what were the facts of his case, and the mismanagement of the defendants in relation to his fruit.

J.... K....

[*Jurat.*]

2568. Order granting new trial before judgment on terms.[7]

[*Title.*]

The defendant's motion to set aside the verdict herein and for a new trial upon the minutes having been heard on this .... day of ....., 19.., and the court being fully advised in the premises.

ORDERED that, upon payment by the defendant of the taxable costs of the former trial, taxed at ..... dollars, within .... days from this date, the verdict herein be set

[7] When a new trial is granted because of errors of the court or because the verdict is perverse, wholly unsupported by the evidence, or procured by fraud, no terms should be imposed; if, however, it be granted because against the preponderance of the evidence simply, or on the ground of mistake or excusable neglect of the party, or surprise, or for newly discovered evidence, terms should ordinarily be imposed.

aside and a new trial granted upon the ground [*here state grounds*].

Further ordered that upon default in such payment said motion be denied and judgment entered upon the verdict on due proof of such default.

[*Date.*] By the Court:
O.... P...., Judge.

2569. The same, without terms.[8]

[*Introduction as in preceding form.*]

ORDERED that the said verdict be and the same is hereby set aside and a new trial granted, costs to abide the event of the action, on the ground that [*here state grounds, as,* that the verdict was perverse, *or* entirely unsupported by the evidence, *or* that the court erroneously instructed the jury in this, *state erroneous instruction*].

[*Date.*] By the Court:
O.... P...., Judge.

2570. Same, after judgment entered.

[*Recitals as in preceding orders.*]

ORDERED that the verdict herein and the judgment entered thereon on the .... day of ....., 19.., be and they are hereby set aside and vacated on the ground that [*state grounds*], the costs of the former trial to abide the event of the action [*or,* upon payment, *state terms as in preceding form*].

[*Date.*] By the Court:
O.... P...., Judge.

2571. Order for new trial for excessive damages.

[*Recitals as in preceding forms.*]

ORDERED: That said verdict be and is hereby set aside and the said motion for a new trial be and is granted [the costs to abide the event], on the ground of excessive damages, unless the plaintiff, within .... days, file a stipulation consenting to remit from said verdict the sum of ..... dollars, and take judgment for the sum of ..... dollars with costs.

In case of such remission, the motion is denied.

By the Court:
O.... P...., Circuit Judge.

[8] See note 7.

2572. Proposed bill of exceptions, jury trial.[9]

[*Title.*]

Be it remembered that this action was brought on for trial at the ..... term of said court, at the court house, in the city of ....., on the .... day of ....., 19.., before the court, Hon. J.... K...., circuit judge, presiding, and a jury, L.... M...., Esq., appearing for plaintiff and O.... P...., Esq., for defendant.

The case being called for trial, before entering upon examination of witnesses, the plaintiff moved for leave to amend his complaint, by inserting therein the following averments [*here insert amendment offered*].

The defendant, by counsel, opposed such motion on the grounds [*state grounds of objections as for instance*, that it substantially changed the cause of action],

Which said motion the court granted and, thereupon, the defendant duly excepted.

The defendant then moved for a continuance on the ground that he had been taken by surprise by the said amendment, and filed the following affidavit in support of such motion [*insert affidavit*] which motion the court denied, and the defendant duly excepted.

The plaintiff then, to maintain the issue on his part, called as a witness E.... F...., who was duly sworn.

[9] The purpose of the bill of exceptions is to incorporate in the record a narrative of the trial with the rulings and exceptions occurring therein and which would not otherwise be a part of the record of the case. This form is prepared specially with reference to the statutes and court rules of Wisconsin (Wis. Stats. 1913 sec. 2873; Cir. Ct. Rule XXIII), but may in substance be utilized in other states covered by this work. Minn. Gen. Stats. 1913 sec. 7832; N. Dak. Rev. Codes 1905 sec. 7058; S. Dak. C. C. P. 1908 sec. 296; Neb. R. S. 1913 sec. 7876 *et seq.* In Iowa the bill of exceptions is abolished in equity cases and practically superseded in all other cases where the testimony is taken in shorthand by direction of the court. Iowa Ann. Code 1907 sec. 3749.

The statutes of the other states covered by this work, referring to this subject, are as follows: Ariz. R. S. 1913 sec. 603 *et seq.;* Ark. Dig. of Stats. 1904 sec. 6221 *et seq.;* Cal. C. C. P. 1906 sec. 646 *et seq.;* Colo. Code Ann. 1911 sec. 419 *et seq.;* Idaho Rev. Codes 1908 sec. 4426 *et seq.;* Kans. Gen. Stats. 1909 sec. 6164 *et seq.;* Mont. Rev Codes 1907 sec. 6783 *et seq.;* Mo. R. S. 1909 sec. 2028 *et seq.;* Okla. Comp. Laws 1909 sec. 5818 *et seq.;* Oregon Laws 1910 sec. 169 *et seq.;* Tex. Civ. Stats. Ann. 1913 art. 2058 *et seq.;* Utah Comp. Laws 1907 sec. 3282 *et seq.;* Wash. Rem. and Bal. Code 1910 sec. 381 *et seq.;* Wyo. Comp. Stats. 1910 sec. 4594 *et seq.*

Thereupon the defendant objected to the reception of any evidence under the complaint for the reason that the complaint does not state facts sufficient to constitute a cause of action, which objection was overruled by the court and the defendant duly excepted.

The witness then testified as follows [*here insert testimony in condensed narrative form until a question which was objected to is reached, when it should be inserted in full with ruling and exception as follows*]:

Q. [*Insert question.*]

To which question the defendant objected as immaterial [*state all grounds of objection fully as made*], which objection was overruled and the defendant excepted.

A. [*Insert answer in full.*]

Defendant then moved to strike out said answer for the reason that [*state reason*], which motion was overruled and defendant excepted. [*Proceed in like manner with the direct examination of the witness.*]

Upon cross-examination the witness testified [*proceed as with the direct examination, also with the redirect examination if any and with the plaintiff's other witnesses*].

The plaintiff then rested.

The defendant thereupon moved for judgment of nonsuit on the ground that the evidence failed to prove the plaintiff's cause of action, which motion was overruled by the court and the defendant duly excepted [*or*, which motion was granted and the plaintiff duly excepted].

The defendant, to maintain the issue on his part, called as a witness G.... F...., and offered to prove by said witness [*here state what*], to which plaintiff, by counsel, objected. The court sustained the objection and the defendant duly excepted.

The said witness then testified as follows [*here state testimony and rulings as in case of plaintiff's witnesses*].

The said witness upon cross-examination testified as follows [*here state same*].

The defendant then rested.

The plaintiff, to further maintain the issue on his part, then called J.... K...., who being sworn, testified [*here insert testimony with objections and exceptions*].

The testimony then closed. The foregoing is all the evidence given on both sides.[10]

[*Or, when the testimony is only in part given, the bill should state:* The foregoing is all the testimony given on both sides, necessary to present the questions of law raised upon the trial.]

The defendant then, before argument to the jury, requested that the jury be directed to find a special verdict, and submitted the following proposed questions for such verdict [*insert proposed questions*]. Thereupon the court directed that the following questions be submitted to the jury for a special verdict [*insert questions*]. The defendant objected to the submission of the first question of said special verdict for the reason [*state reason*], which objection was overruled by the court and the defendant excepted.

The plaintiff [*or* defendant] then asked the court to instruct the jury as follows [*here insert instructions asked, separately, and state at the end of each instruction refused*], which instruction the court refused and the plaintiff [*or* defendant] duly excepted.

The court then instructed the jury as follows [*here insert charge in separate propositions inserting at the foot of each proposition to which exception was taken*], to which instruction the defendant duly excepted.

The jury then retired, and after deliberation returned into court with their verdict, which is of record, wherein they found for the plaintiff and assessed his damages at the sum of ..... dollars [*or, if the verdict is special, set it forth in detail*].

And afterwards, at the said term, defendant moved for a new trial, on the judge's minutes, on the ground:

1. That the verdict is contrary to law.
2. That the verdict is contrary to the evidence.
3. [*Set forth other grounds, if any.*]

Which motion the court overruled, and thereupon the defendant duly excepted.

[10] The bill must be certified to contain all the evidence in case it be desired by the appellant to reverse the judgment on the ground that the verdict or finding is not sustained by the evidence. This statement may also properly be inserted in the certificate of the judge at the close of the bill.

And because the foregoing evidence, rulings, instructions and exceptions do not appear of record, I, the undersigned, the ..... judge, who tried said action, have, on due notice, settled and signed this bill of exceptions to the end that the same be made part of the record herein, this .... day of ....., 19.. [and I certify that so much of said testimony as appears herein in the form of question and answer so appears by my direction in that form because I deemed it material that it should so appear].[11]

O.... P...., ... Judge.
.... Judicial Circuit.

[*The bill should be folioed. Circuit court rules Wis. X. Each line should be numbered, so that proposed amendments may specifically refer to the line to be amended.*]

2573. Notice served with proposed bill of exceptions.

[*Title.*]

SIR: Please take notice that the within [*or*, annexed] is a copy of the bill of exceptions, proposed on behalf of the defendant in this action, and that a copy of the reporter's notes taken at the trial, and transcribed in longhand are also delivered to you herewith.[12]

[*Date.*]

To G.... H...., Esq.,
Plaintiff's Attorney.

J.... K....,
Defendant's Attorney.

2574. Reporter's certificate (Wis. circuit court rule XXIII).

[*Title.*]

I, L.... M...., phonographic reporter of the ..... circuit court, state of Wisconsin, duly appointed and qualified, do hereby certify that the foregoing is a correct transcript, in long hand, of my notes taken upon the trial of said action and that the same contains a full and complete transcript of the evidence and all other matters relating to said action contained in said notes.

[*Date.*]

L.... M....,
Official Reporter.

[11] See circuit court rules Wis. XXIII.

[12] In Wisconsin a certified transcript, in longhand, of the phonographic reporter's notes must be delivered to the opposing party with the proposed bill of exceptions. C. C. Rule XXIII.

2575. Proposed amendments to bill of exceptions.

[*Title.*]

SIR: Please take notice that the following amendments are proposed on the part of the plaintiff to the bill of exceptions, proposed by the defendant, to-wit:

First. On page ...., line ...., strike out the words [*state words*].

Second. On page ...., line ...., and at the end of sentence insert the following [*state what*].

Third. On page ...., line ...., strike out the words [*state what*], and insert in place thereof the words [*state them*].

[*Date.*]

To J.... K...., Esq.,
Defendant's Attorney.

G.... H....,
Plaintiff's Attorney.

2576. Notice of settlement of bill of exceptions.

[*Title.*]

SIR: Please take notice that the defendant's proposed bill of exceptions in this action with the amendments thereto proposed by the plaintiff, will be presented for settlement to the Hon. O.... P...., the judge who tried this action, at his chambers, in the .... of ....., in ..... county, on the .... day of ....., 19.., at .... o'clock .. M.

[*Date.*]

J.... K....,
Attorney for Defendant.

To G.... H...., Esq.,
Attorney for Plaintiff.

2577. Certificate to bill of exceptions or statement of facts (Wash. Rem. and Bal. Code 1910 sec. 391).

[*Venue.*]

On this .... day of ....., 19.., pursuant to due notice of application for settlement and certification of the statement of facts in the foregoing entitled action, the parties to said action appearing by their respective attorneys of record therein, the undersigned J.... K...., judge of said court presiding at the trial of said action, now hereby settles the annexed and foregoing STATEMENT OF FACTS as the statement of facts in said action, and hereby certifies:

That the matters and proceedings embodied in the annexed and foregoing statement of facts, together with the depositions, exhibits and other written evidence introduced

or offered in evidence upon the trial of said action and filed in said cause, and now marked and identified by me as follows [*mark same*] are matters and proceedings occurring in said cause, and the same are hereby made a part of the record therein; and that the same contain all the testimony on which said cause was tried; evidence produced or offered by either of the parties to said action, together with all the objections and exceptions of counsel taken to the reception or rejection of testimony, and the rulings of the court thereon; all documents and instruments in writing introduced or offered in evidence; and all the material facts, matters and proceedings heretofore occurring in said cause, and not already a part of the record therein; and the clerk is hereby ordered to attach to the said statement all of the said original exhibits on file in said cause as herein identified, including the following original papers in said cause which may be important to a correct decision of the appeal, and which the clerk of this court is ordered to transmit to the clerk of the supreme court: [*have papers*].

Done at ....., 19..

J.... K....,
Judge.

CHAPTER CXLI.

CONTEMPT PROCEEDINGS.

2578. Order of summary conviction of a witness for criminal contempt in refusing to answer a question in the immediate presence of the court. (Wisconsin and North Dakota).

2579. The same, for a breach of the peace or disturbance in open court.

2580. Commitment for criminal contempt committed in immediate view of the court. (Wisconsin and North Dakota).

2581. Affidavit for order to show cause why party should not be punished criminally for contempt not committed in presence of the court. (Wisconsin).

2582. The same, to punish criminally the publication of a false report of judicial proceedings. (Wisconsin and North Dakota).

2583. Order to show cause in criminal contempt, based on either of last two affidavits

2584. Attachment for arrest of contemner in criminal proceedings for contempt.

2585. Order of conviction for criminal contempt not committed in presence of the court. (Wisconsin and North Dakota).

2586. Commitment for criminal contempt not committed in presence of the court. (Wisconsin and North Dakota).

2587. Order of summary conviction, in civil contempt proceedings, of witness for refusing to answer proper questions, in the presence of the court. (Wisconsin).

2588. Affidavit in civil contempt proceedings, showing failure to comply with court's order, for payment of money. (Wisconsin).

2589. Warrant of commitment in civil contempt proceedings for failure to pay money. (Wisconsin).

2590. Affidavit on which to move for order to show cause, or attachment, in civil contempt proceedings; general form. (Wisconsin and Minnesota).

2591. The same, for violation of injunctional order.

2592. The same, for attachment of witness for not obeying a subpoena.

2593. Warrant of arrest of contemner. (Minnesota).

2594. Attachment for witness disobeying a subpoena. (Wisconsin).

2595. Attachment for juror or witness. (Two forms).

2596. Writ of habeas corpus to bring up contemner already in custody by virtue of other process. (Wisconsin and Minnesota).

2597. Order that interrogatories be filed, after attachment. (Wisconsin and North Dakota).

2598. Interrogatories to be filed under last preceding order. (Wisconsin and North Dakota).
2599. Answers to interrogatories in contempt proceedings. (Wisconsin and North Dakota).
2600. Judgment of conviction in civil contempt proceedings and directing payment of fine. (Wisconsin).
2601. The same, where indemnity for actual loss is ordered to be paid instead of a fine.
2602. The same, where imprisonment is ordered.
2603. Commitment for civil contempt.

The power to punish as contempt any act which tends to obstruct the course of justice or prejudice the trial of an action or proceeding in court is held to be inherent in courts of general jurisdiction. This power may be regulated and the manner of its exercise prescribed by statute, but it can not be wholly taken away nor substantially impaired. State ex rel. v. Circuit Court, 97 Wis. 1; 72 N. W. 193; Kregel v. Bartling, 23 Nebr. 852; 37 N. W. 668. In Wisconsin an act of contempt may be punished either criminally or civilly.

Acts of contempt which may be punished criminally are enumerated in Wis. Stats. 1913 sec. 2565; when committed in the immediate view and presence of the court they may be punished summarily without process, but in other cases the accused party must have notice of the accusation and time to make his defense. Id. sec. 2566. The punishment may be by fine or imprisonment or both. Id. secs. 2567, 2568. This proceeding is brought to vindicate the dignity of the court and is to be prosecuted in the name of the state, and the fine goes to the school fund as in criminal prosecutions.

Acts which may be punished civilly are enumerated in Wis. Stats. 1913 sec. 3477. The purpose of civil contempt proceedings is, primarily, to indemnify the party whose rights or remedies have been defeated or prejudiced by the act of contempt, or to compel the performance of a duty which may yet be performed, or both. A fine or imprisonment, or both, may be imposed, or if actual loss or injury be shown the guilty party may be ordered to pay a sufficient sum as indemnity to the injured party instead of a fine. Emerson v. Huss, 127 Wis. 215; 106 N. W. 518. The proceedings may be summary when the contempt is committed in the presence of the court; otherwise they are to be based upon affidavit and order to show cause or attachment.

The papers should be entitled in the action in which the contempt occurred if an order to show cause be applied for, but if an attachment be issued the proceeding becomes an original special proceeding in the name of the state on the relation of the complainant. Wis. Stats. 1913 sec. 3481.

In Minnesota no distinction is preserved by the statutes between civil and criminal contempt proceedings; but contempts are divided into direct contempts, which are those committed in the immediate view and presence of the court, and may be punished summarily without process or proof; and constructive contempts, which are those not committed within the immediate presence of the court. Minn. Gen. Stats. 1913 chap. 91; State ex rel. v. Ives, 60 Minn. 478; 62 N. W. 831. A prosecution for constructive contempt is begun by affidavit to be followed by warrant of arrest or order to show cause. Punishment is by imprisonment or fine or both, and by imposition of an indemnity to be paid for any actual loss to the injured party. Minn. Gen. Stats. 1913 secs. 8363, 8364.

In Iowa contempt proceedings are criminal in their nature and governed by chapter 17 title 21 Iowa Code 1897. If the contempt be committed in the presence of the court it may be punished summarily, but if not the proceedings must be based on affidavit and rule to show cause; the punishment may be by fine or imprisonment or both. Iowa Code 1897 secs. 4464, 4465.

In North Dakota contempts are classified into civil and criminal contempts, substantially similar to the division made in Wisconsin, and the procedure closely follows the Wisconsin procedure. N. Dak. Rev. Codes 1905 chap. 35 secs. 7550–7573.

The South Dakota code seems to contain no general provisions governing the procedure or punishment in contempt proceedings in courts of record. There are, however, numerous sections providing for punishment as for contempt upon the failure of persons to obey summons, subpoena or other orders of the court, and in some instances the procedure and punishment is specified. S. Dak. C. C. P. 1908 secs. 494, 495.

In Nebraska contempts are regulated by Neb. R. S. 1913 secs. 8236–8238. The proceedings are held to be in their nature criminal, direct when committed in presence of the court and constructive when not so committed. Proceed-

ings for constructive contempts must be commenced by information under oath or affidavit stating positively all the necessary facts, as in a prosecution for crime.

In California, Idaho, Montana and Utah, the statutes regulating contempts are practically identical.[1] All contempts whether civil or criminal in their nature, direct or constructive, are grouped together. In the remaining states the statutes are varied and they will be found cited in the note.[2] Wyoming provides no special procedure but, like South Dakota, simply specifies certain acts of disobedience to court orders which constitute contempts and may be punished.

The question whether a given contempt proceeding is civil or criminal in its character is often doubtful; however, in a general way the true rule would seem to be that when the proceeding is brought to vindicate simply the dignity of the court or punish a wrong to the public it is essentially a criminal proceeding, but if brought on the relation of a private party to compel performance of an order of the court in a civil action or obtain indemnification for an act which has impeded, defeated or impaired his rights in the action it is a civil proceeding.

The question as to the proper method of entitling the proceeding is also much confused in the books. In the absence of statutory direction on the subject it would seem that, if the object of the proceeding is punishment for the public wrong it should be brought in the name of the state; if to compel the performance of an act for a party in a civil action or the indemnification of such a party it should be entitled in the civil action out of which the alleged contempt arose. 9 Cyc. p. 36.

It is not probable that any court would reverse a conviction for contempt because the proceedings were wrongly

[1] Cal. C. C. P. 1906 sec. 1209-1222; Idaho Rev. Codes 1908 sec. 5155-5168; Mont. Rev. Codes 1907 sec. 7309-7322; Utah Comp. Laws 1907 sec. 3358.

[2] Ariz. R. S. 1913 sec. 1798-1804; Ark. Dig. of Stats. 1904 sec. 719-730; Colo. Code Ann. 1911 sec. 355-368; Kans. Gen. Stats. 1909 sec. 2483-2488; Mo. R. S. 1909 sec. 3881-3885; Okla. Comp. Laws 1909 sec. 2227-2230; Oregon Laws 1910 sec. 670-684; Tex. Ann. Civ. Stats. 1913 art. 1708; Wash. Rem. and Bal. Code 1910 sec. 1049-1062.

entitled, provided the substantial rights of the convicted party have been preserved.

In Oregon and Washington the statutes provide that "in the proceeding for contempt the state is plaintiff" and that in all cases of public interest the proceeding may be prosecuted by the prosecuting attorney on behalf of the state, and in all cases where the proceeding is commenced upon the relation of a private party such party shall be deemed a co-plaintiff with the state.

In Colorado it is held that the statutory provisions do not cover criminal contempts but that the latter are still governed by common law principles.[3] In Oklahoma all the statutory provisions are contained in the chapter on crimes and their punishment, and the treatment indicates that the proceeding is regarded as criminal in its nature.

2578. Order of summary conviction of a witness for criminal contempt in refusing to answer a question in the immediate presence of the court (Wis. Stats. 1913 secs. 2565, 2566; N. Dak. Rev. Codes 1905 sec. 7550, 7551).[4]

STATE OF .....
In .... Court .... County.

State of ....., Plaintiff,
vs.
A.... B...., Defendant.

At a general term of said court begun and held in the court house in the city of ..... on the .... day of ....., 19.., and on the .... day of ....., 19..

President, Hon. J.... K...., Circuit [*or* District] Judge, Presiding.

[3] People vs. News-Times Co. 35 Cal. 359; 84 Pac. 912.

[4] This form and the two following forms, though specially drawn to meet the requirements of the codes of Wisconsin and North Dakota, will doubtless serve, with slight changes, in other states for the punishment of contempts committed in the immediate view of the court.

On this .... day of ....., 19.., at the hour of .... o'clock, the said court being in session and the action of L.... M.... vs. O.... P.... being then on trial, the above named A.... B.... * was duly called as a witness for the plaintiff in said action and duly sworn, and was as such witness asked the following question [*insert question*], and the court having ruled that said question was competent and proper and having ordered the said A.... B.... to answer the same, he, the said A.... B...., then in the immediate view and presence of the court, contumaciously refused, and still refuses, to answer the said question, the same being a proper and legal interrogatory; and the said A.... B.... being now still present in court; it is now

ORDERED AND ADJUDGED that he the said A.... B.... is guilty of a criminal contempt of court in so contumaciously refusing to answer said question; and it is further adjudged that the said A.... B...., as punishment for said contempt, be imprisoned in the jail of the county of ..... for the term of .... days [and pay a fine in the sum of ..... dollars, and that he be committed to the jail of ..... county until said fine is paid or until he be discharged therefrom according to law].

By the Court:
J.... K...., Judge.

2579. The same, for a breach of the peace or disturbance in open court.

[*Proceed as in last preceding form to the * and then continue*] did then and there in open court and in the immediate view and presence of the court commit an assault and battery upon the person of one C.... D.... [*or* did then and there make a disturbance in court by loudly and repeatedly shouting in profane and opprobrious language, *or otherwise describe the disturbance, breach of the peace or disorderly proceeding, according to the fact*], and did thereby wilfully interrupt the business of the court and impair the respect due to its authority, and the said A.... B.... being now still present in court, it is now

ORDERED AND ADJUDGED, etc. [*continue as in last preceding form.*]

2580. Commitment for criminal contempt committed in immediate view of the court (Wis. Stats. 1913 secs. 2567, 2568; N. Dak. Rev. Codes 1905 sec. 7551).

THE STATE OF .....
to the Sheriff of ..... County,

GREETING: Whereas, on the .... day of ....., 19.., in an action then pending and on trial in the ..... court for ..... county, at the court house, in the city of ....., in ..... county, wherein L.... M.... is plaintiff and O.... P.... is defendant, A.... B.... was called and sworn as a witness [*here recite facts as in the last preceding order, and also the adjudication of the court and continue*];

And whereas the said A.... B.... has not paid the said fine so imposed upon him and still refuses to pay the same,

Now therefore we command you that you take the body of the said A.... B.... and safely keep him in custody in the common jail of the county of ..... until the said A.... B.... shall pay the said fine and costs or shall be thence discharged according to law, not exceeding, however, the term of thirty days from this date [*or, if the punishment be by imprisonment, substitute after the command to imprison*, for the term of .... days from this date or until he be thence discharged according to law].

Witness, the Hon. J.... K...., judge of our ..... court for the county of ....., at the court house in the .... of ....., in said county, this .... day of ....., 19..

[SEAL.]

C.... K...., Clerk.

2581. Affidavit for order to show cause why party should not be punished criminally for contempt not committed in presence of the court (Wis. Stats. 1913 sec. 2565).

STATE OF .....
..... Court for ..... County.

State of .....,
Plaintiff,
vs.
A.... B....,
Defendant.

[*Venue.*]

Y.... Z.... being first duly sworn says:*

That on the .... day of ....., 19.., in an action pending in said court, wherein L.... M.... was plaintiff and O.... P.... defendant, an order was duly made by this court, of which a copy is hereto annexed marked Exhibit A, requiring the above named defendant to [*here specify act required*].

That on the .... day of ....., 19.., the said order was duly served on said defendant, at said county, by delivering to him personally a true copy thereof, and at the same time exhibiting to him the said original order aforesaid with the signature of the judge of said court appended thereto as more fully appears by the affidavit of service indorsed on said order and on file in this court [*or* attached hereto and marked Exhibit B].

That said A.... B.... has wilfully and contumaciously refused and still refuses to obey said order in this, to-wit [*state the act or failure to obey*].

That this application is made for the purpose of obtaining an order to show cause why said A.... B.... should not be punished as for criminal contempt.

Y.... Z....

[*Jurat.*]

2582. The same, to punish criminally the publication of a false report of judicial proceedings (Wis. Stats. 1913 sec. 2565; N. Dak. Rev. Codes 1905 sec. 7550).

[*Commence as in last preceding form to the * and continue*]:

That on the .... day of ....., 19.., a certain action wherein L.... M.... was plaintiff and O.... P.... was defendant, was pending in the said court and was brought on

for trial and tried before said court at the court house in the city of ..... in said county.

That the defendant A.... B.... then was and still is the publisher and proprietor of a certain daily newspaper of large circulation called the N.... Z...., which was and still is published at the said city of ....., and that the said A.... B.... on the .... day of ....., 19.., caused to be printed and published in his said newspaper a pretended report of the proceedings of said court upon said trial, in the following words [*insert copy of report*].

That the said pretended report was and is a grossly false and inaccurate report of the proceedings upon said trial, in this [*here state particulars in which the report is false or inaccurate, negativing the truth of the report as to each particular in which it was erroneous*].

That the falsity and inaccuracy of said report in the particulars aforesaid was well known to the defendant at the time of said publication, and that the said defendant wilfully published the same.

That this application is made, etc. [*conclude as in last preceding form*].

2583. Order to show cause in criminal contempt, based on either of last two affidavits.

[*Title and caption as in first form in this chapter.*]

On reading and filing the affidavit of Y.... Z....,

ORDERED that the above named defendant A.... B.... show cause before this court at the court house in the city of ..... in said county on the .... day of ....., 19.., at .... o'clock in the .... noon of said day, or as soon thereafter as counsel can be heard, why he should not be punished as for contempt for his misconduct in failing to obey the order of said court as set forth in the said affidavit [*or otherwise state the act of contempt according to the fact*].

Let this order and a true copy of said affidavit be served on said A.... B.... at least .... days before the time herein fixed for hearing.

By the Court:
J.... K...., Judge.

2584. Attachment for arrest of contemner in criminal proceedings for contempt.

STATE OF .....
..... Court ..... County.

The State of .....,
Plaintiff,
vs.
A.... B....,
Defendant.

THE STATE OF.....
to the Sheriff of ..... County.

GREETING: We hereby command you that you attach A.... B.... and have his body before our said ..... court, at a term thereof to be held at the court house in the city of ....., in said county, on the .... day of ....., 19.., at .... o'clock A. M. of said day, then and there to make answer concerning a certain contempt which it is alleged he has committed against said court in wilfully refusing to obey that certain order of said court [*describe order*] requiring him to [*state act required and disobeyed*] which order was duly served upon him, also to answer as to such other matters as may be then and there laid to his charge, and to abide and perform the order of the court made thereon.

Witness, etc. [*conclude as in Form 2580*].

2585. Order of conviction for criminal contempt not committed in presence of the court (Wis. Stats. 1913 sec. 2567; N. Dak. Rev. Codes sec. 5932).

[*Title and caption as in first form in this chapter.*]

The order dated ....., 19.., requiring the defendant A.... B... to show cause before this court why he should not be punished as for a criminal contempt for his misconduct in [*here specify act of contempt*], coming on to be heard before the court, at the time fixed therein, and said defendant having appeared in person, and by W.... X...., his counsel [*or in case of arrest of defendant by an attachment*]: The attachment issued by this court in the above entitled matter on the .... day of ....., 19.. requiring the arrest

of the defendant A.... B.... to answer for his misconduct in [*specify act of contempt*], having been duly returned, and the said defendant having been arrested thereunder and brought before the court, and the said matter having been heard and tried before the court, the said A.... B.... being present in person and by his counsel W.... X...., and the court having heard the proofs and arguments of the parties, and given full opportunity to the said defendant to make defense and purge himself of said contempt,

IT IS ORDERED and adjudged, etc. [*continue as in Form 2578*].

2586. Commitment for criminal contempt not committed in presence of the court (Wis. Stats. 1913 sec. 2567; N. Dak. Rev. Codes 1905 sec. 7550).

THE STATE OF .....

to the Sheriff of ..... County.

GREETING: Whereas in certain proceedings for criminal contempt brought and tried in the ..... court of ..... county aforesaid, against A.... B...., it was made to appear to the court that the said A.... B.... had been guilty of a criminal contempt of said court, in this, that [*here state the particular circumstances of the contempt*];

And whereas it was thereupon duly adjudged by this court that the said A.... B.... was guilty of a criminal contempt and that he be punished therefor by [*state terms of judgment*];

And whereas the said A.... B.... has not paid the said fine so imposed on him and still refuses to pay the same;

Now therefore we command you that, etc. [*conclude as in Form 2580*].

2587. Order of summary conviction, in civil contempt proceedings, of witness for refusing to answer proper questions, in the presence of the court (Wis. Stats. 1913 secs. 3477, 3478).

[*Title and caption as in the first form in this chapter save that it should be entitled in the civil action in which the contempt occurred instead of being entitled as a separate criminal action.*]

[*Recite the contempt committed substantially as in the first form in this chapter and proceed*]:

IT IS ADJUDGED and determined that he, the said C.... D...., is guilty of contempt of court in so contumaciously refusing to answer said question; that the said misconduct was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the plaintiff in said action [and that the said plaintiff suffered actual loss and injury thereby in the sum of ..... dollars].

And it is further adjudged that the said C.... D...., as punishment for said contempt [pay a fine in the sum of ..... dollars and costs, *or in case of actual loss*, pay to the said A.... B.... the sum of ..... dollars to indemnify the said A.... B.... for his actual loss aforesaid and to satisfy his costs and expenses, and that the said C.... D.... be committed to the common jail of ..... county until such fine and costs *or* indemnity be paid or he be discharged therefrom according to law].

[*If the punishment be by fine and imprisonment*], be imprisoned in the common jail of ..... county for the term of .... days from this date or until he be discharged therefrom according to law; and pay a fine, etc. [*as above*].

By the Court:

J.... K...., Judge.

[*The commitment under the foregoing conviction may be substantially as in Form 2580, with appropriate variations necessitated by the difference in the form of the judgment.*]

2588. Affidavit in civil contempt proceedings, showing failure to comply with court's order for payment of money (Wis. Stats. 1913 sec. 3479).[5]

STATE OF WISCONSIN.

..... Court ..... County.

A.... B....,
Plaintiff,

vs.

C... D...,
Defendant.

[*Venue.*]

A.... B...., being first duly sworn, says that he is the plaintiff in the above entitled action; that on the .... day of ....., 19.., at ....., in said county, he served the order hereto annexed [*or* a copy of which is hereto annexed] on C.... D..., the defendant in this action, by delivering to him personally a true copy thereof, and at the same time exhibiting to him the original order and the signature of J.... K...., the judge who signed the said order thereon; and then and there made personal demand of the said C.... D...., that he pay the sum required to be paid by said order: and that the said C.... D.... then and there refused to pay the same and stated to affiant that he would not pay said sum at any time; and affiant further says that said sum is still unpaid.

A.... B....

[*Jurat.*]

2589. Warrant of commitment in civil contempt proceedings for failure to pay money (Wis. Stats. 1913 sec. 3479).

STATE OF WISCONSIN.
..... Court ..... County.

A.... B....,
Plaintiff,
vs.
C.... D....,
Defendant.

THE STATE OF WISCONSIN
to the Sheriff of ..... County.

GREETING: Whereas on the .... day of ....., 19.., an order was duly made and entered by this court in the

[5]This form and the form immediately following are intended to meet the provisions of sec. 3479 Wis. Stats. 1913, which provide that upon proof, by affidavit, of service of an order requiring the payment of money and of refusal to pay the court or judge may at once issue a warrant of commitment to jail until the sum and costs are paid. No order to show cause is required under this section, nor is any formal judgment necessary save the formal warrant of commitment as in the form immediately following.

above entitled action ordering and requiring the defendant C.... D.... to pay [*state terms*]; and whereas it has been made to appear by the affidavit of A.... B.... that on the .... day of ....., 19.., at ..... the said A.... B.... made personal demand upon said C.... D.... for the payment of said sum of ..... dollars required to be paid by said order and that the said C.... D.... then and there contumaciously refused and still refuses to pay the same;

And whereas it appears that the said refusal of the said C.... D.... to comply with the order of the court aforesaid was calculated to and actually did defeat and impair the rights and remedies of the said A.... B.... in said action,

Now, therefore, we hereby command you that you take the body of the said C.... D..., and commit him to the common jail of said county of ....., there to remain until such sum and the costs and expenses of the proceedings, to-wit, the sum of ..... dollars shall be paid, or until he be thence discharged according to law.

Witness, the Hon. J.... K...., judge of said court, at the court house, in the city of ....., in said county, on the .... day of ....., 19..

[SEAL.]

J.... K...., Clerk.

2590. Affidavit on which to move for order to show cause, or attachment, in civil contempt proceedings; general form (Wis. Stats. 1913 sec. 3480; Minn. Gen. Stats. 1913 sec. 8357).

STATE OF .....
..... Court, ... County.

A.... B....,
Plaintiff,
vs.
C.... D....,
Defendant.

[*Venue.*]

A.... B...., being duly sworn, says that he is the plaintiff in the above entitled action*.

That [*here state particularly all the facts necessary to be proven to show that a civil contempt under the proper statute has been committed with substantially that certainty required in a criminal complaint*].

That the said misconduct of the said C.... D... was calculated to and did in fact defeat and impair the rights and remedies of the plaintiff A.... B.... in the above entitled action [and that said misconduct caused an actual loss and injury to this affiant in the sum of ..... dollars].

That no previous application has been made for the punishment of said misconduct and that affiant makes this affidavit for the purpose of moving for an order to show cause why said C.... D.... should not be punished as for contempt.

[*Jurat.*] A.... B....

[*In case the application is for an attachment the affidavit should be entitled,* "State of ....., Ex. Rel., A.... B...., Plaintiff, v. C.... D...., Defendant." *Wis. Stats. 1913 sec. 3481; N. Dak. Rev. Codes 1905 sec. 7555.*]

[*The order to show cause in Wisconsin and North Dakota may be substantially as in Form 2583, entitling it, however, in the civil action in which the contempt occurred; if an attachment be issued it may be as in Form 2584, entitling it* "State Ex Rel., A.... B.... v. C.... D...."]

2591. The same, for violation of injunctional order.

[*Title and caption as in last preceding form.*]

[*Proceed as in last form to the *, and continuing*]:

That said action was commenced by this affiant against the said defendant and is now pending in this court for the purpose of obtaining a divorce from said defendant and that on the .... day of ....., 19.., an injunctional order was issued out of this court in said action enjoining and prohibiting the said defendant C.... D.... from imposing any restraint upon affiant's personal liberty during the pendency of said action, which order was duly and personally served upon said defendant on the .... day of ....., 19.., and at the same time the original order with the signature of

J.... K...., who granted said order, appended thereto, was exhibited to said C.... D....

That notwithstanding said order the said C.... D.... on the .... day of ....., 19.., at ....., with force and arms made an assault upon this affiant and beat and bruised her and deprived her of her personal liberty for the space of .... days, to-wit, from .... to ...., in contempt of said injunction order.

That the said misconduct of the said C.... D.... was calculated to and did, etc. [*proceed as in last preceding form*].

2592. The same, for attachment of witness for not obeying a subpoena.

STATE OF .....
..... Court, ... County.

State of..... ex rel. A.... B...., Plaintiff.

vs.

L.... M...., Defendant.

[*Venue.*]

A.... B.... being duly sworn says he is the plaintiff in the action of A.... B.... vs. C.... D.... which action is now pending in said court.

That L.... M.... is a necessary and material witness for the plaintiff in said action without whose testimony he can not safely proceed to the trial of the issue in said action, as affiant is advised by O.... P...., Esq., his counsel, who resides at ....., after affiant has fully stated to his said counsel what he expects to prove by the said L.... M...., and as this affiant verily believes.

That a subpoena, which is hereto annexed, was duly served on said L.... M...., on the .... day of ....., 19.., at said county, as appears by the proof of service indorsed thereon; and that the fees of said witness for said trial and attendance, to-wit, the sum of ..... dollars, were

duly paid [*or*, tendered] to him, as appears by said proofs indorsed on said subpoena.

That the distance to be traveled by said witness in coming from his residence, where said subpoena was served on him, to the place of trial of this action, is .... miles.

That said witness has failed and neglected to appear as required by said subpoena, and has disobeyed the command thereof.

That affiant makes this affidavit for the purpose of moving for an attachment for said witness, and that no previous application has been made for such attachment.

A.... B....

[*Jurat.*]

2593. Warrant of arrest of contemner (Minn. Gen. Stats. 1913 sec. 8357–8359).

[*Venue.*]

THE STATE OF .....

to the Sheriff of ..... County,

GREETING: You are hereby commanded to apprehend L.... M.... of .... and bring him before the ..... court of ..... county at the court house in the city of ..... forthwith [*or state time and place*], then and there to answer for an alleged contempt committed by him in not [*here insert alleged act of contempt*].

[*If the warrant fix a time in the future for the appearance and the court deem it best to admit the party to bail, continue as follows*]:

And you are further directed and authorized to admit the said L.... M.... to bail for his appearance at the time and place above specified by taking from said L.... M.... a recognizance in the sum of ..... dollars, with two sufficient sureties, to the effect that he will appear on the return of this warrant and abide the order of the court thereon, or pay as may be directed the sum therein specified.

Hereof fail not; and make due return of this warrant and your doings therein at the time and place aforesaid.

Witness, etc. [*as in Form 2580*].

2594. Attachment for witness disobeying a subpoena (Wis. Stats. 1913 secs. 3480, 4065).

THE STATE OF .....

to the Sheriff of ..... County,

GREETING: Whereas, it has been made to appear to our ..... court for ..... county, by due proof, that on the .... day of ....., 19.., at said county, a subpoena issued out of said court directed to said L.... M.... requiring him to appear before our said court, on the .... day of ....., 19.., at .... o'clock in the forenoon of said day, to give evidence in a certain cause then and there to be tried between A.... B...., plaintiff, and C.... D...., defendant, on the part of the plaintiff, was duly and personally served upon said L.... M.... at ..... on the .... day of ....., 19.., and that the fees of said witness for such attendance, and for traveling to and returning from the place where he is required by said subpoena to attend, were then and there duly paid [*or*, tendered], and that he has failed and neglected to attend, as required by such subpoena, and is not in attendance.

Now, therefore, we command you that you attach the said L.... M...., and forthwith bring him before our said court, at the court house, in the city of ....., in said county, to answer for his contempt in not obeying said subpoena, and to testify in said cause in which he is summoned as aforesaid.

Witness, etc. [*as in Form 2580*].

2595. Attachment for juror or witness.

[*Title of Court.*]

In the Name of the State of .....

To the Sheriff of ..... county,

GREETING: G.... H...., having been duly summoned according to law to be and appear in the above entitled court to serve as a juror [*or*, to give testimony as a witness] and on the .... day of ....., 19.., the said G.... H.... was called to serve [*or*, to give testimony] as aforesaid in a cause wherein A.... B.... is plaintiff, and C.... D.... is defendant, and came not but made default.

YOU ARE therefore commanded forthwith to arrest the above named G.... H.... and bring him before this court

to show cause why he should not be punished for contempt, or if the court have adjourned for the term, that you deliver him into the custody of the jailer of the county aforesaid.

By order of the court:

[SEAL.] Witness my hand and the seal of said court this .....day of ....., 19..

R.... S...., Clerk.

[*In Colorado the following form is in use*]:

[*Venue.*]

The people of the STATE OF .....

to the Sheriff of ..... county, GREETING:

WHEREAS, It has been shown to the judge of the ..... court of said county, that G.... H.... was duly summoned to appear and serve as a ..... in said court on the .... day of ....., 19.., in a certain cause pending in said court wherein A.... B.... is plaintiff, and C.... D.... is defendant, and the said G.... H.... having failed to attend said court as he was therein required to do. You are therefore commanded to take and bring before the said court forthwith the body of the said G.... H.... to show cause why he should not be fined for contempt.

Witness, etc., [*as above*].

2596. Writ of habeas corpus to bring up contemner already in custody by virtue of other process (Wis. Stats. 1913 sec. 3485; Minn. Gen. Stats. 1913 sec. 8363).

[*Venue.*]

THE STATE OF .....

to the Sheriff [*or*, Keeper of the Common Jail of ..... County,

GREETING: We command you, that you have the body of L.... M...., detained in our said jail under your custody, as it is said, under safe and secure conduct, before our ..... court for ..... county at the city of ..... in said county on the .... day of ....., 19.., at .... of the clock, on the .... noon then and there to answer for an alleged contempt committed by him in not [*here insert alleged act of contempt*].

And you are further commanded to detain the said L.... M.... before our said court at the time and place aforesaid until the further order of the court.

Hereof fail not; and make due return of this writ with your doings thereon at the time and place aforesaid.

Witness, etc. [*as in Form 2580*].

2597. Order that interrogatories be filed, after attachment (Wis. Stats. 1913 sec. 3488; N. Dak. Rev. Codes 1905 sec. 7560).

THE STATE OF .....
..... Court for ..... County.

The State of .... ex rel. A... B...,
Plaintiff,
vs.
L.... M....,
Defendant.

An attachment having been issued out of this court against L.... M.... upon the complaint of A.... B...., charging him, the said L.... M...., with misconduct in violating the order of this court, made and entered in an action, wherein A.... B.... is plaintiff, and C.... D.... defendant, dated ....., 19.., directed to and requiring said L.... M.... to [*state act required; or otherwise state the act of contempt according to the fact*].

And the said L.... M.... being in custody and now here present to answer the attachment herein, and appearing by W.... X...., his attorney, and the relator by Y.... Z...., his attorney, and not admitting but denying the offense charged; after hearing counsel for the respective parties,

ORDERED that the said A.... B.... file with the clerk of this court and serve on said L.... M....'s attorneys within .... days, interrogatories specifying the facts and circumstances alleged against said L.... M.... and requiring his answer on oath thereto, and that within .... days after such service of said interrogatories, the said L.... M.... file and serve on the relator's attorney his written answers thereto on oath.

Further ordered that said L.... M.... be held in custody by the sheriff [*or*, attend without further notice before this court], to abide the judgment and determination thereof as to his alleged contempt.

[*Date.*] By the Court:
J.... K...., Circuit Judge.

2598. Interrogatories to be filed under last preceding order (Wis. Stats. 1913 sec. 3488; N. Dak. Rev. Codes 1905 sec. 7560).

[*Title as in last preceding form.*]

And now comes the said relator pursuant to the order of this court and files the following interrogatories to be propounded to L.... M...., touching a contempt alleged against him in the above entitled matter for [*here state contempt charged*]:

I. Are you the defendant in an action pending in said court entitled A.... B.... vs. L.... M....?

II. Was an order of said court served on you, on the .... day of ....., 19.., requiring you to [*here state requirement of the order*]?

III. If you answer yes to the foregoing second interrogatory, did you obey said order?

IV. If you answer no to the third interrogatory, state why you failed to obey said order.

[*Follow with other questions as the case may require.*]

W.... X....,
Attorney for Relator.

2599. Answers to interrogatories in contempt proceedings (Wis. Stats. 1913 sec. 3488; N. Dak. Rev. Codes 1905 sec. 7560).

[*Title as in Form 2597.*]

Answers of the said L.... M.... to the interrogatories filed by the relator herein on the .... day of ....., 19..

I. To the first interrogatory he answers, Yes.

II. [*Proceed in like manner to answer each interrogatory.*]

L.... M....

[*Venue.*]

L.... M.... being duly sworn says he is the person charged with contempt in the above entitled matter and that the above and foregoing answers to the interrogatories filed by the relator herein are true.

L.... M....

[*Jurat.*]

2600. **Judgment of conviction in civil contempt proceedings and directing payment of fine (Wis. Stats. 1913 sec. 3489).**

[*Title of court and cause and caption as in first form in this chapter. If the defendant comes before the court on order to show cause the title used should be the title of the action or proceeding in which the contempt was committed, if on attachment or habeas corpus this order should be entitled* "State of ..... ex rel. (*complainant*) vs. L.... M.... (*contemner*)"].

The order of this court dated ....., 19.., requiring L.... M.... to show cause why he should not be punished as for contempt for his misconduct in [*here specify act of contempt*], coming on to be heard before the court, at the time fixed therein, and said L.... M.... having appeared in person, and by W.... X...., his counsel, and the plaintiff also appearing by his attorney[s] herein, and having heard the proofs and arguments of the parties, and given full opportunity to the said defendant to make defense and purge himself of said contempt.

ORDERED and adjudged that L.... M.... is guilty of contempt in having wilfully disobeyed the order made by the court in this action, on the .... day of ....., 19.., in this, that he [*state the violation specifically*].

That the said misconduct of said L.... M.... was calculated to and actually did defeat, impair and prejudice the rights and remedies of the said A.... B...., plaintiff herein.*

That, as punishment for said misconduct, the said L.... M.... do forthwith pay a fine of ..... dollars and the costs and expenses of these proceedings, amounting in all to ..... dollars, and that he be committed to the county jail of ..... county until said fine and costs and expenses be paid and [*if the misconduct consist of the omission of an act*

still within his power], until he shall comply with said order by [*here state the act to be done*].

By the Court:
J.... K...., Judge.

2601. The same, where indemnity for actual loss is ordered to be paid instead of a fine (Wis. Stats. 1913 sec. 3490; N. Dak. Rev. Codes 1905 sec. 7562).

[*Proceed as in last preceding form to the * and continue*]:

That as punishment for said misconduct the said L.... M.... forthwith pay to A.... B.... as indemnity the actual loss and injury produced to said A.... B.... by said misconduct which is adjudged to be the sum of ..... dollars together with ..... dollars, the costs and expenses of these proceedings, and that in default of the payment of said indemnity and costs and expenses the said L.... M.... be committed to the common jail of ..... county until said indemnity and costs and expenses be paid, etc. [*as in last preceding form*].

[*In Minnesota the indemnity may be imposed in addition to the fine (Minn. Gen. Stats. 1913 sec. 8364), but in Wisconsin it takes the place of the fine.*]

2602. The same, where imprisonment is ordered.

[*Proceed as in Form 2600 to the * and continue*]:

That as punishment for said misconduct the said L.... M.... be imprisoned in the common jail of ..... county for the term of .... days from this date, or until he be thence discharged according to law. Let a commitment issue accordingly.

By the Court:
J.... K...., Circuit Judge.

2603. Commitment for civil contempt.

THE STATE OF .....
to the Sheriff of the County of .....,
GREETING: Whereas, on the .... day of ....., 19.., upon proceedings duly brought before the ..... court of

..... county, L.... M.... was adjudged to be guilty of contempt of said court, in this, that [*here state the contempt found and adiudged, with certainty*].

And whereas it was then and there adjudged by this court that the said L.... M.... be punished by [*here state terms of judgment*].

Now therefore we command you that you take the body, etc. [*proceed as in Form 2580 conforming to the terms of the judgment*].

AA 000 850 981 2